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No.

In The

Supreme Court of the United States

October Term, 1994

BORDEN, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

vs.

LOCAL 222, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Intervenor/Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the new rule created by the National Labor Relations Board, which requires Borden, Inc. to maintain two different sets of terms and conditions of employment for employees in the same unit, is inconsistent with federal law and unreasonable.

A. Whether the new rule is inconsistent with the principle that the majority of employees in a bargaining unit establish the terms and conditions of employment for all employees in the unit; a principle upon which both Borden, Inc. and the National Labor Relations Board's Division of Advice relied.

B. Whether the new rule will create labor unrest by unreasonably requiring workers doing the same job at the same location to receive different wages and work under different conditions of employment.

C. Whether the new rule interferes with the bargaining relationship contemplated by the National Labor Relations Act between Local 222, International Brotherhood of Teamsters, AFL-CIO and Borden, Inc. by requiring Borden, Inc. to recognize and apply terms and conditions of employment that do not reflect the economic realities of the employment setting.

D. Whether the new rule discourages the free movement of capital and labor.

II. Whether Borden, Inc. was required to implement each and every term of its last offer following a bargaining impasse.

A. Whether the Court of Appeals for theTenth Circuit

erroneously held that the Administrative Law Judge found that Local 222, International Brotherhood of Teamsters, AFL-CIO had not waived implementation of the Farmer Jack contract as to the transferred employees.

B. Whether the Administrative Law Judge held that impasse had not occurred.

III. Whether retroactive application of the National Labor Relations Board's new rule is improper where Borden, Inc. relied on established federal law and an Advice Memorandum from the National Labor Relations Board's Division of Advice to conduct its activities, and where the rule requires Borden, Inc. to apply labor conditions to a situation not contemplated when the labor contract was negotiated.

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The Petitioner, Borden, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in the subject case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit ("Tenth Circuit") is reported at 13 F.3d 502, and is reprinted in the Appendix hereto. App. at 1a. The opinion of the National Labor Relations Board ("NLRB" or "Board") is reported at 308 N.L.R.B. 113, and is reprinted in the Appendix hereto. App. at 28a. The decision of the Administrative Law Judge is unreported. It is reprinted in the Appendix hereto. App. at 45a.

On March 15, 1994, the Tenth Circuit entered judgment in this matter, granting the Board's Petition for Enforcement of Order and denying the Petitions for Review submitted by Borden, Inc. ("Borden") and Local 222, International Brotherhood of Teamsters, AFL-CIO ("Teamsters").[1] The court's jurisdiction was based on National Labor Relations Act ("NLRA" or "Act") § 10(f), 29 U.S.C. § 160(f) (1973). On March 29, 1994, Borden filed a Petition for Rehearing with the court. The court entered an Order on April 18, 1994 denying Borden's petition. Thus, this Petition for Writ of Certiorari is timely filed pursuant to Rule 13 of the Supreme Court Rules. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1993).

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1. The caption above contains the names of all parties. Borden does not have a parent company nor any wholly or nonwholly owned subsidiaries. The International Brotherhood of Teamsters, AFL-CIO, shall be referred to as "Teamsters International", while references to Local 222 shall be to the "Teamsters."

STATUTES INVOLVED

The statutes involved in this matter are 28 U.S.C. § 1254 (1993); NLRA § 8(a)(1), (3), (5), 29 U.S.C. § 158(a)(1), (3), (5) (1973); NLRA § 9(a), 29 U.S.C. § 159(a) (1973); and NLRA § 10(f), 29 U.S.C. § 160(f) (1973); and are reproduced in the Appendix. App. at 121a.

STATEMENT OF THE CASE

This case arises out of Borden's consolidation of two plants in Salt Lake City, Utah, the Meadow Gold facility and the Farmer Jack facility. Relying on the principle that the majority of the employees in a bargaining unit determine the terms and conditions of employment for all employees in the unit and an Advice Memorandum from the Board's Division of Advice, Borden unilaterally applied the terms and conditions of employment at the Farmer Jack facility to employees moved from the Meadow Gold facility to the Farmer Jack facility. The Board later adopted a new rule holding that Borden was required to maintain the Meadow Gold contract conditions as to the Meadow Gold employees following their movement.

Further, despite a finding that Borden engaged in good-faith bargaining, the Board found that Borden's conduct was not justified as a post-impasse implementation of its last offer, nor justified by the Teamsters' waiver of the implementation of the Farmer Jack labor agreement. The Tenth Circuit affirmed the Board's order, and held that retroactive application of the new rule was warranted.

In 1986, Borden acquired the Meadow Gold dairy products processing and distribution operations in Salt Lake City, Utah from

Beatrice, Inc.[2] App. at 49a (Decision of Administrative Law Judge ("ALJ")). At the time of acquisition, the Meadow Gold employees were represented by the Teamsters, and were covered by a nationwide, master collective bargaining agreement as well as regional and sub-regional addenda to that agreement. App. at 49a (ALJ). Prior to agreeing to purchase the Meadow Gold facility, Borden met with the Teamsters International on October 9, 1986, and negotiated and entered into an interim labor agreement which replaced the nationwide master agreement. App. at 49a (ALJ). The parties further agreed that new local addenda would be negotiated as existing local agreements expired and that a pattern agreement would be negotiated at the first opportunity. App. at 49a-50a (ALJ). Borden then agreed to and did purchase the Meadow Gold facility. At the time of acquisition, Borden replaced Beatrice in the State of Utah addendum negotiations then in progress. App. at 50a (ALJ). An agreement was reached and ratified in May 1987, covering the period from May 1, 1987 to November 1, 1990. App. at 50a (ALJ).

On November 6, 1987, Borden purchased the Farmer Jack dairy products processing and distribution operations from Borman Acquisition Corporation.[3] App. at 52a (ALJ). One of the terms of the purchase agreement was an agreement by Borden to sell dairy products produced at the Farmer Jack plant to Borman's remaining retail facilities in Utah at a contractually-specified price

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2. Actually, Beatrice was purchased by investors through the offices of Kohlberg, Kravis and Roberts. The Meadow Gold facility was put up for sale by the investors, and Borden ultimately purchased the plant. App. at 49a (ALJ).

3. The Farmer Jack facility was previously owned by Safeway Stores, Inc. In late 1986, Safeway Stores was acquired by investors in a leveraged buyout and certain of its assets were put up for sale. Borman purchased the entire Utah Division of Safeway Stores, including plants, retail outlets, a distribution center, and warehousing and trucking operations. However, after running into financial difficulties, Borman began looking for a buyer for the Farmer Jack facility. In September 1987, Borman and Borden signed a letter of intent regarding the sale of the Farmer Jack facility. App. at 50a-51a (ALJ).

for a long period of time. App. at 51a-52a, n.3 (ALJ). The price was established pursuant to a formula which included the then-existing labor costs at the Farmer Jack facility. App. at 51a-52a, n.3 (ALJ).

At the time of acquisition, the Farmer Jack employees were represented by the Teamsters, and were covered by a collective bargaining agreement negotiated by Borman and the Teamsters, covering the period from April 10, 1987 to April 30, 1992. App. at 50a-51a (ALJ).[4] On October 12, 1987, Borden met with the Teamsters and informed the Teamsters that Borden intended to purchase the Farmer Jack facility, that it intended to assume the Farmer Jack collective bargaining agreement then in effect, and that it intended to close the Meadow Gold facility and consolidate its operations at the newer Farmer Jack facility. App. at 51a (ALJ). The Teamsters requested that Borden keep the terms of the Farmer Jack agreement in effect. Following its acquisition, Borden began operations at the Farmer Jack facility, retaining all former Borman employees and applying the terms of the agreement in effect immediately prior to acquisition. App. at 51a (ALJ).

On November 10, 1987, Borden met with the Teamsters to confirm its acquisition of the Farmer Jack facility, its retention of the Borman employees, its application of the Borman contract, and its intention to consolidate the Meadow Gold and Farmer Jack operations at the Farmer Jack facility. App. at 53a (ALJ). Soon thereafter, Borden and the Teamsters began negotiations for a new contract to cover the Farmer Jack employees. Although the Teamsters demanded terms and conditions of employment comparable to those at the Meadow Gold facility, Borden insisted

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4. The agreement reflected substantial monetary concessions on the part of the Teamsters. Borman demanded and received concessions when it contemplated purchasing the Farmer Jack facility from Safeway Stores on the ground that the concessions were necessary to make the purchase practicable. App. at 50a-51a (ALJ).

on maintaining the Farmer Jack terms and conditions because they were necessary to remain profitable under the special contract to provide dairy products to Borman. App. at 51a-52a, n.3 (ALJ).

On November 12, 1987, the Teamsters sent Borden a letter stating:

> The purpose of this letter is to request an immediate meeting to negotiate the wages, hours, and working conditions of all employees (all Farmer Jack and Meadow Gold) affected by this sale. Further, this letter is to request that the present Farmer Jack Labor Agreement not be unilaterally altered by your company pending completion of these negotiations.

App. at 102a-103a. On January 5 and 6, 1988, Borden again met with the Teamsters to announce the consolidation of the Meadow Gold and Farmer Jack operations, and its intent to complete the consolidation by July 1988. App. at 53a (ALJ). At that time, the parties began negotiations regarding the effects of closure of the Meadow Gold facility, including the possible transfer of the Meadow Gold employees to Farmer Jack.[5] App. at 53a-54a (ALJ). The Teamsters submitted a written proposal to transfer Meadow Gold employees to Farmer Jack, dovetail the seniority of the transferred employees and freeze or "red circle" the transferred Meadow Gold employee wage rates as of the time of their transfer. App. at 54a (ALJ). The Teamsters otherwise proposed that the Farmer Jack contract be applied to the Meadow Gold employees upon transfer. Borden rejected the proposal. App. at 54a (ALJ).

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5. Under the previous contract, Beatrice, Inc. was obligated to transfer employees upon closure. However, under the agreement then existing, the Teamsters and Borden were merely obligated to bargain about the effects of the closure, and transfer was not required.

On January 13, 1988, the parties again met to discuss the effects of the closure of the Meadow Gold facility and the new agreement to cover the Farmer Jack facility. App. at 54a (ALJ). At that time, Borden proposed to transfer the Meadow Gold employees and to dovetail seniority, but Borden did not propose to "red circle" Meadow Gold employee wage rates. Instead, Borden proposed to pay transfer and severance payments to Meadow Gold employees. App. at 54a (ALJ). No agreement was reached. App. at 54a (ALJ).

On March 29, 1988, the parties continued their negotiations. App. at 55a (ALJ). The Teamsters again submitted a proposal to transfer the Meadow Gold employees and to "red circle" their wage rates. Borden proposed to increase transfer and severance payments. App. at 55a (ALJ). No agreement was reached. App. at 55a (ALJ).

The parties met further in May and October, 1988, but no further proposals were exchanged, nor was an agreement ever reached regarding the transfer of the Meadow Gold employees to the Farmer Jack facility. App. at 55a (ALJ).

While these negotiations continued, beginning in May 1988, Borden began shutting down some operations at the Meadow Gold facility. App. at 60a-61a (ALJ). Borden would shut down a particular operation, lay off the employees involved in that operation, transfer the operation to the Farmer Jack facility, and resume the operation at the Farmer Jack facility. App. at 60a (ALJ). By October 7, 1988, all production ceased at the Meadow Gold facility. App. at 60a-61a (ALJ). From May to October, 1988, as operations were independently shut down and transferred, Borden informed laid off employees that they could contact the state employment office regarding employment at the Farmer Jack facility. App. at 60a (ALJ). Employees who did so were required to go through an employment process which included a state interview, a physical examination and completion of a Farmer Jack

application. App. at 61a (ALJ). Since Borden and the Teamsters were unable to reach an agreement regarding the transfer of the Meadow Gold employees to Farmer Jack, laid off Meadow Gold employees subsequently hired at the Farmer Jack facility were treated as new hires, and were compensated at the then-prevailing Farmer Jack wage rates. App. at 61a (ALJ). The former Meadow Gold employees never constituted a majority of the employees at the Farmer Jack facility. App. at 66a (ALJ).

On February 26, March 11, and April 7, 1988, the Teamsters filed charges against Borden alleging, in relevant part, that Borden had violated § 8(a)(5), (3) and (1) of the Act by laying off and rehiring certain Meadow Gold employees, by unilaterally implementing the Borman agreement upon acquisition of Farmer Jack, and by unilaterally altering the terms and conditions of employment of the Meadow Gold employees employed at the Farmer Jack facility. App. at 6a.

After an investigation of the charges, the matter was submitted to the Board's Division of Advice. *See* App. at 104a-118a. On July 13, 1988, Harold J. Datz, Associate General Counsel of the Board, issued an Advice Memorandum in which he advised, in relevant part, that a Complaint should not be issued against Borden alleging that Borden unilaterally altered the terms and conditions of the Meadow Gold employees employed at the Farmer Jack facility. App. at 114a-115a. In so advising, Mr. Datz relied on *Central Soya Company*, 281 N.L.R.B. 1308 (1986). App. at 114a. Borden obtained a copy of the Advice Memorandum from the Regional Director and relied on it during the balance of the closure of the Meadow Gold facility and the subsequent movement of the Meadow Gold employees to Farmer Jack.

Subsequently, the Board refused to issue a Complaint against Borden, and the Teamsters appealed the refusal to the Board's Office of Appeals. Nearly one year after Mr. Datz' Advice Memorandum, the Office of Appeals issued a decision finding that

a Complaint could be issued against Borden alleging that it was an unfair labor practice for Borden to unilaterally apply the Farmer Jack terms and conditions of employment to former Meadow Gold employees now employed at the Farmer Jack facility. App. at 119a-120a.

The present proceedings were commenced on June 15, 1989. Administrative Law Judge Clifford H. Anderson ("ALJ") issued his decision on January 24, 1990. App. at 96a (ALJ). The ALJ found that Borden had transferred the Meadow Gold employees to the Farmer Jack facility, App. at 61a (ALJ), had violated § 8(a)(1) of the Act by offering clerical employees increased benefits if they abandoned representation,[6] and had violated § 8(a)(5) and (1) by dealing directly with the bargaining unit employees. App. at 90a (ALJ). The ALJ specifically found that Borden had bargained in good faith regarding the closure of the Meadow Gold facility and the new Farmer Jack agreement, and had not improperly applied the Farmer Jack working conditions to the Meadow Gold employees transferred to Farmer Jack. App. at 90a (ALJ).

Over two and one-half years later, in a decision dated July 31, 1992, the Board affirmed the ALJ's findings and conclusions of law, App. at 29a (Decision and Order of the National Labor Relations Board ("Bd. Order")), and further held for the first time that Borden violated § 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of Meadow Gold employees transferred to the Farmer Jack facility and compensating them at Farmer Jack rates, App. at 36a (Bd. Order), and § 8(a)(3) and (1) by constructively discharging certain Meadow Gold employees.[7] App. at 37a (Bd. Order).

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6. The § 8(a)(1) charge applied to clerical employees who were not covered by the Farmer Jack agreement.

7. The Board held that those Meadow Gold employees who retired rather than accept employment at Farmer Jack, with the corresponding reduced (Cont'd)

On August 19, 1992, Borden filed a Petition for Review with the Tenth Circuit. Subsequently, the Teamsters filed a Cross-Petition for Review, and the Board filed an Application for Enforcement. The Tenth Circuit granted the Board's application, holding that each of the Board's conclusions were supported by substantial evidence. App. at 27a (Opinion of the Tenth Circuit Court of Appeals ("10th Cir.")). The Court also held that retroactive application of the Board's new rule established in this case was warranted. App. at 22a (10th Cir.). Borden seeks review of the Tenth Circuit's decision.

REASONS FOR GRANTING THE WRIT

I.

THE BOARD'S NEW RULE REQUIRING BORDEN TO MAINTAIN AND APPLY TWO SEPARATE SETS OF TERMS AND CONDITIONS OF EMPLOYMENT IS INCONSISTENT WITH FEDERAL LAW AND UNREASONABLE.

A. Standard of Review

To be upheld, a Board decision must be "rational and consistent with the [National Labor Relations] Act." *NLRB v. Curtis Mathenson Scientific, Inc.*, 494 U.S. 775, 787 (1990); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

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pension-benefit contributions, were constructively discharged. The Tenth Circuit affirmed. Borden does not seek review of this decision.

B. The New Rule Is Inconsistent with the "Majority" Principle.

The "majority" rule is a foundational cornerstone of the national labor policy. The rule is evident in every aspect of our labor laws.[8] Under the Act, a *majority* of the employees in a bargaining unit choose a collective bargaining representative to represent *all* of the employees in the unit. NLRA § 9(a), 29 U.S.C. § 159(a). That collective bargaining representative negotiates the terms and conditions of employment which will apply to all employees in the bargaining unit. An individual or minority group of employees who did not support the election of the collective bargaining representative is powerless to negotiate different, individualized terms and conditions of employment.

A corollary of the majority rule is that where two or more separate units of employees are merged due to a corporate change, *e.g.*, merger, the new, single contingent of employees is governed by one set of terms and conditions of employment, as determined by the majority.

This Court has implicitly recognized this principle. In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), this Court held that a successor employer could not be ordered by the Board to maintain and apply the terms and conditions of a collective bargaining contract between the predecessor and the union representing the predecessor's employees. In that case, the Wackenhut Corporation and Lockheed were parties to a contract under which Wackenhut provided security services to Lockheed for a period of one year. At the expiration of the contract, Lockheed announced that it had accepted the bid submitted by Burns for the next year's security services. Burns hired 27 of Wackenhut's employees, while hiring 15 of its own. The Board ordered Burns to

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8. In fact, prior to this case, only one special situation warranted variance from the majority rule. *See infra* pages 18-20.

abide by the terms of the collective bargaining agreement between Wackenhut and the union. The Court reversed holding that Burns had an obligation to recognize and bargain with the union, but was not obligated to maintain the terms of the collective bargaining agreement between Wackenhut and the union. Burns could, under the Court's decision, apply the terms and conditions of the employees which it hired to the former Wackenhut employees. The upshot of *Burns* is that one set of terms and conditions of employment, as determined by the majority through collective bargaining, would apply to all of Burns' employees.

The Tenth Circuit likewise implicitly has recognized and applied this principle. In *Central Soya Company v. NLRB*, 867 F.2d 1245 (10th Cir. 1989), the Tenth Circuit held that the employees of one facility were accreted into a unit consisting of employees transferred to that facility pursuant to the employer's consolidation, and that the collective bargaining agreement of the transferred unit would apply to all the employees. In that case, Central Soya operated two facilities in Abilene, Kansas. One facility, the First Street facility, employed 15 union employees covered by a collective bargaining agreement. The other facility, the Washington Street facility, employed seven non-union employees. In 1980, Central Soya decided to close its outdated First Street facility and consolidate its operations at the Washington Street facility. It also decided to transfer the First Street employees to the Washington Street facility, but to not honor the First Street collective bargaining agreement. The Board held that the Washington Street employees were accreted into the First Street unit, and that the First Street collective bargaining agreement applied to all the employees. The Tenth Circuit affirmed. Again, the Board's and the court's decisions are consistent with the well-recognized rule that one set of terms and conditions of employment, as determined by the majority, apply to all employees in the same unit.

Further, in relocation cases, the Board applies the well-established principle on which Borden relies. For example, in *Harte & Company*, 278 N.L.R.B. 947 (1986), an employer relocated a film and sheeting manufacturing facility from Brooklyn, New York to Bound Brook, New Jersey. The employer applied the collective bargaining agreement at the Brooklyn facility to the employees at the Bound Brook facility following the relocation. The Board held that the employer's conduct was lawful, again implicitly recognizing and applying the rule that one set of terms and conditions of employment should apply to all employees in one unit. *Id.* at 949; *see also Marine Optical, Inc.*, 255 N.L.R.B. 1241 (1981); *Westwood Import Co.*, 251 N.L.R.B. 1213 (1980).

In every situation in which an employer-initiated organizational change is involved, one set of terms and conditions of employment is applied to all employees in the bargaining unit. The denomination of the employer's action as an accretion or relocation only serves to identify which set of terms and conditions of employment should apply to all employees. Where the employer's conduct does not fit neatly into one of these categories, the implication is that the employer can choose which one set of terms and conditions of employment should apply to all employees subject, of course, to the bargaining process,[9] not that the principle

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9. The ALJ and the Board's Division of Advice both found that Borden lawfully chose to apply the terms and conditions of the Farmer Jack facility to the Meadow Gold employees. Indeed, the Board's Division of Advice stated:

> [W]hen Meadow Gold completes the relocation and the consolidation of its operations with the Farmer Jack facility, Meadow Gold employees will not constitute a majority of bargaining unit employees, which *Central Soya Co.*, supra, teaches is necessary for a finding that Meadow Gold's contract follows the transferred employees to the new facility. In short, since there is no accretion, the Employer can lawfully refuse to apply the

(Cont'd)

is inapplicable. However, rather than rule that the employer can choose which one set of terms and conditions of employment should apply to all employees, as the ALJ and Division of Advice did, the Board ruled that the principle did not apply and ordered Borden to maintain two sets of terms and conditions of employment. The Board's new rule is plainly inconsistent with established federal labor law principles, and the Tenth Circuit erred in affirming its decision.

C. The New Rule Is Unreasonable.

Not only is the Board's new rule inconsistent with established principles of federal law, it ignores a fundamental policy underlying the Act which this Court has recognized. Under the Act, an employer and a representative of the employees are to negotiate regarding the terms and conditions of employment within the framework of the economic realities then existing. This Court has stated:

> The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but *to allow the balance of bargaining advantage to be set by economic power realities.* Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 288 (1972) (emphasis added). The Board's new rule ignores this policy

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Meadow Gold contract to the Farmer Jack facility.

App. at 114a-115a.

by requiring Borden to honor the Meadow Gold contract at the Farmer Jack facility.

The Tenth Circuit stated that the parties should begin negotiations from the status quo *ante*. App. at 18a (10th Cir.). However, the court, and the Board, mistakenly determined that to be a bifurcated status quo. The status quo *ante* must be the status quo at the facility at which the contract will be performed. The starting point for negotiations should be the economic realities of such facility and the existing terms and conditions of employment therein. From this starting point, the parties are in the proper relational position, and realistic negotiations can occur. The Board's new rule skews the starting point for negotiations by importing terms and conditions of employment from another economic situation.

Further, the new rule is not grounded in any relevant experience nor based on sound, or even common sense, reasoning. The Board states:

> Maintaining the status quo by requiring the terms of both contracts to remain in effect after a consolidation, such as the one that occurred here, promotes the statutory interest of stability in collective bargaining. Maintaining the status quo ensures that both portions of the merged unit begin from the same relative point. Like any employees in a pre-bargaining posture, they both enter negotiations with their respective preexisting terms and conditions of employment intact.
>
> * * *
>
> Contrary to the Respondent's argument that a bifurcated status quo would promote

> industrial unrest, our experience and judgment leads us to conclude that it is more likely to prompt both parties to negotiate an agreement expeditiously.

App. at 35a-36a (Bd. Order).

The Board's purported reliance on prior experience with a bifurcated status quo is disingenuous. This is a case of first impression. In the only situation in which the Board has required a bifurcated status quo, *i.e.*, the *Federal-Mogul* situation, the Board acknowledged that the bifurcated status quo would remain intact until the existing collective bargaining agreement expired. *Federal-Mogul Corp.*, 209 N.L.R.B. 343, 344 (1974). Thus, even in that situation, the Board gained no experience concerning the impact of a bifurcated status quo on the efforts of the parties to expeditiously negotiate a new agreement.

Likewise, reason dictates that the Board's new rule will not lead to industrial peace nor an expedited agreement. By virtue of the Board's new rule, employees with the same seniority performing the same duties at the same location will receive different compensation and benefits and will work under different conditions until a new agreement may be negotiated. For these reasons, administration of the bifurcated status quo is virtually impossible. For example, the Meadow Gold and Farmer Jack employees had different and conflicting vacation rights, layoff rights, promotion rights, bidding procedures, grievance procedures, shift selection procedures and other conditions of employment. Inevitably, tension between conflicting contract provisions must lead to unrest among the employees, between the employees and the company and between the company and the union.

Furthermore, as a general proposition, neither reason nor experience suggest that the rule will promote expedited agreement. By virtue of the new rule, one group of employees will have terms

and conditions of employment which are considered better than another group's terms and conditions of employment. In that situation, a union has no motivation to negotiate a new agreement expeditiously. In fact, the union may be obligated to delay agreement to preserve the beneficial terms and conditions of employment for the advantaged group of employees. Even under the new rule, an employer or a union may be motivated to delay agreement if it believes that the bifurcated status quo is more beneficial to it than any agreement it could negotiate under the prevailing circumstances. The Board's notion that forced upheaval will produce an expeditious agreement ignores too many variables to be a sound basis on which to create a new rule.

The present case itself exposes the frailty of the Board's reasoning. In this case, the Teamsters had no motivation to negotiate a new agreement expeditiously. The Meadow Gold terms and conditions of employment were believed to be better than the Farmer Jack terms and conditions of employment. Hence, the Teamsters argued strenuously below that those terms and conditions should be applied to all employees.[10] The perceived difference between the Meadow Gold contract and the Farmer Jack terms and conditions of employment is a result of the relative bargaining power of the parties at the time of negotiation. In the previous Farmer Jack negotiations, Borman was in an advantageous bargaining position because of its precarious financial condition. Whereas, in the previous Meadow Gold negotiations, the union was in an advantageous bargaining position because of the financial strength of the employer. Thus, the Teamsters surely knew that it must contend with this bargaining history; that the starting point for future negotiations was Borman's past financial troubles. The Teamsters had no motivation to even begin negotiations when they faced the possibility that the

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10. The Teamsters' argument was rejected by the Board and the Tenth Circuit.

terms and conditions of a substantial portion of their members would be less beneficial.

The myriad of circumstances in which the Board's new rule may be applied demonstrates the absurdity of the Board's proposition that the new rule will promote expeditious agreement. However, it cannot be disputed that the Board's new rule will not promote industrial peace. In any case, employees with the same seniority performing the same job at the same location will receive different terms and conditions of employment.

Finally, the Board's rule interferes with the free movement of capital and labor. This Court has stated in the successorship situation:

> We also agree with the Court of Appeals that holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in an old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 287-288 (1972). This reasoning is equally applicable here. The Board's new rule saddles Borden with a collective bargaining agreement negotiated under circumstances which it determined were no

longer financially feasible. It places Borden at a competitive disadvantage, and, in so doing, is not in the best interests of the employees or the market. As part of its agreement to buy Farmer Jack, Borden agreed to supply Borman with dairy products at a contractually-specified price based, in part, on the then-existing labor costs. The Board's rule introduced new labor costs into the Farmer Jack operation and made the price determination obsolete. In the present case, the rule placed Borden at a competitive disadvantage by forcing it to sell products at a price that was not reflective of its labor costs. In a broader sense, the rule may have the effect of discouraging the transfer of union employees from a failing operation to another operation, or the effect of discouraging the consolidation of businesses.

In sum, the Board's new rule has no rational economic, practical or experiential basis.

D. The Authorities Relied on by the Board and the Tenth Circuit Are Inapposite.

The cases relied on by the Board and the Tenth Circuit are readily distinguishable from the cases relied upon by Borden in the present case, and from the present case itself. *See* App. at 16a-18a and 34a-35a (10th Cir. and Bd. Order). The Board and the court rely on *Federal-Mogul Corporation,* 209 N.L.R.B. 343 (1974), and its progeny,[11] in which the Board held that an employer had violated the Act by unilaterally applying the terms and conditions of employment of an existing bargaining unit to employees who had voted to become part of the bargaining unit in an *Armour-Globe* election. The Board held that the employer must negotiate with the union regarding the terms and conditions of employment

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11. It is interesting that *Federal-Mogul* was never cited by the General Counsel to support its novel theory until after the Board had relied on the case *sua sponte.*

of the additions to the unit. The present case is more akin to the cases relied on by Borden than to the cases relied on by the Board and the court.

In the cases on which Borden relies and in the present case, the employees became part of an existing unit as a result of a corporate change by the employer, *e.g.*, relocation, consolidation, successorship, rather than as a result of an *Armour-Globe* election. The decision in *Federal-Mogul* is an anomaly which exists because the situation involved employee action. In every situation involving employer action, a single set of terms and conditions of employment has been applied to all employees. Further, in *Federal-Mogul,* the employees voting to join the unit were setup employees, a job classification not then included in the unit. No harm would result in allowing the *Globed* employees to bargain for different terms and conditions of employment. However, in the employer-action cases, the employees joining the unit performed the same jobs at the same location as the original members of the unit. In this situation, there would be an obvious danger to industrial stability by allowing the new employees to work under different terms and conditions of employment. Thus, application of *Federal-Mogul* to the present situation creates the outrageous situation where employees with the same seniority performing the same job at the same location received different wages and worked under different conditions.

Furthermore, the Board and the court completely ignore the concerns underlying the Board's decision in *Federal-Mogul.*[12] In that case, the Board reasoned that requiring the employer to maintain and apply two separate sets of terms and conditions of employment promotes bargaining stability. However, the concerns

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12. Although Borden denies that *Federal-Mogul* is applicable to the present case, it does recognize that the concerns underlying that decision are relevant.

therein are very different than the concerns the Board purported to address in the present case. In *Federal-Mogul*, the Board expressed concern that an opposite decision would allow the employer to unilaterally apply terms and conditions of employment to the employees voting to join the collective bargaining unit and would allow the employees to "vote themselves a share of the bargain which the other parties had agreed to between and for themselves." *Id.* at 344. In essence, the Board was concerned with unilateral action by both parties. That concern is clearly not present in this case. The Teamsters and Borden did bargain about the terms and conditions of employment of the Meadow Gold employees when they engaged in effects bargaining regarding the closure of the Meadow Gold plant. In fact, the Farmer Jack conditions which were applied were the result of negotiations between the parties. Thus, not only is *Federal-Mogul* factually inapposite, the concerns which underlie the decision are not present in this case.

In conclusion, the Board's decision, which the Tenth Circuit affirmed, is inconsistent with established federal law and unreasonable. For the reasons stated above, this Court should grant Borden's Petition for Writ of Certiorari.

II.

THE BOARD IMPROPERLY HELD THAT BORDEN VIOLATED THE ACT BY UNILATERALLY IMPOSING ON THE MEADOW GOLD EMPLOYEES THE TERMS OF THE FARMER JACK FACILITY PRIOR TO BARGAINING TO IMPASSE.

A. An Employer Need Not Implement Every Term of Its Last Offer.

The Tenth Circuit held:

> [T]he ALJ found that even if an impasse had

> existed, Borden did not, in fact, implement its last offer, or preserve the status quo, with respect to the "transferred" and laid-off Meadow Gold employees. The ALJ noted that the "transferees" carried no seniority and received no credit for Meadow Gold employment. . . . Consequently, the ALJ's determination, affirmed by the Board, that a *bona fide* impasse did not exist, was not clearly erroneous and will be upheld.

App. at 26a-27a (10th Cir.).[13]

The court's holding ignores established law and is erroneous. An employer may unilaterally implement terms after impasse so long as the terms have been previously offered to the union during bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). However, an employer which is at impasse need not implement every term of its last offer. It may implement some or all of its proposals. *I. Bahcall Indus.*, 287 N.L.R.B. 1257 (1988); *Presto Casting Co.*, 262 N.L.R.B. 346 (1982). To the extent that the Tenth Circuit holds that an employer must implement every term of its last offer for its unilateral action to be lawful, its decision is plainly contrary to existing federal law.

In the present case, Borden applied the Farmer Jack wage rates to the transferred Meadow Gold employees after impasse. These Farmer Jack rates were offered to the Teamsters during negotiations. The fact that Borden did not dovetail seniority, as it

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13. As a preliminary matter, Borden does not argue that the Tenth Circuit's affirmance of the Board's decision that Borden had engaged in good-faith bargaining is erroneous, and does not raise that issue herein. Nor does Borden argue that the Tenth Circuit erroneously affirmed the ALJ's decision that the Teamsters had waived the requirement that impasse precede unilateral action with regard to the Farmer Jack employees, nor does it raise that issue herein.

had offered to do, is not dispositive, and does not preclude a finding that Borden implemented its last offer. The Board's finding to the contrary is erroneous, and the Tenth Circuit erred in affirming that decision.

B. The Tenth Circuit Misconstrued the ALJ's Decision Regarding the Teamsters' Waiver.

The Tenth Circuit held:

> [T]he Union's waiver applied only to the Farmer Jack employees, not to the transferred Meadow Gold employees. That is, Borden could not unilaterally apply the Farmer Jack CBA to the transferred Meadow Gold employees, absent an impasse in negotiations, simply because the Union consented to its application to the original Farmer Jack employees.

App. at 26a (10th Cir.).

Again, the Tenth Circuit erred. The ALJ's decision logically must be read to find that the waiver did apply to the transferred Meadow Gold employees. The ALJ found that the Teamsters waived implementation of the Farmer Jack labor agreement, App. at 70a (ALJ), but rejected Borden's argument that the implementation was made after impasse. App. at 69a (ALJ). The ALJ further held that Borden lawfully applied the Farmer Jack terms and conditions of employment to the Meadow Gold employees based on applicable law.[14] App. at 76a-77a (ALJ). Since the ALJ did not recognize the General Counsel's "novel"

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14. The ALJ refused to recognize the General Counsel's "novel" theory which the Board ultimately adopted. App. at 76a (ALJ).

theory which would have required Borden to maintain the Meadow Gold contract and did not find an unfair labor practice, the ALJ implicitly found that the unilateral implementation of the Farmer Jack contract as to the Meadow Gold employees was justified. Since the ALJ rejected Borden's argument that the implementation was post-impasse, he must have found that the implementation was justified on the basis of the November 12, 1987 letter. Otherwise, the ALJ would have found that Borden unlawfully unilaterally applied the Farmer Jack contract to the Meadow Gold employees. There is no other logical reading of the ALJ's decision.

C. The Tenth Circuit Ignored Substantial Evidence Indicating Impasse.

Finally, even if the Teamsters' waiver did not apply to the Meadow Gold employees, the evidence shows that Borden and the Teamsters did bargain to impasse. The Tenth Circuit held:

> The ALJ found that an impasse in negotiations *did not* exist because Borden's "implementation of the [Farmer Jack] contract was a course of conduct undertaken from the time of its acquisition of the [Farmer Jack] facility and was not initiated after some later argued impasse in bargaining." . . . Upon its consolidation of the Meadow Gold and the Farmer Jack facilities, Borden claimed that the Borman CBA was equally applicable to the transferred Meadow Gold employees.

App. at 26a (10th Cir.).

Impasse is "a state of facts in which the parties, despite the best of faith, are simply deadlocked." *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 482 (5th Cir. 1963). The Board has delineated a number

of relevant factors for determining whether an impasse has occurred: the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *dismissing review*, 395 F.2d 622 (D.C. Cir. 1968). Based on facts relevant to these factors, there is simply not substantial evidence supporting the Board's decision.

The Tenth Circuit failed to recognize the extent of the negotiations following the acquisition of the Farmer Jack facility. Borden and the Teamsters negotiated regarding a new agreement for the Farmer Jack employees and regarding the effects of the closure of the Meadow Gold facility. Thus, even if Borden did implement the Farmer Jack terms and conditions of employment as to the Farmer Jack employees immediately following acquisition, that fact does not address whether Borden and the Teamsters bargained to impasse regarding the terms and conditions of employment of the Meadow Gold employees.

In fact, between January 5, 1988 and March 29, 1988, Borden and the Teamsters met four times to discuss the effects of the closure of the Meadow Gold facility. Despite good faith negotiations, the parties were unable to reach an agreement regarding the transfer of the Meadow Gold employees to the Farmer Jack facility. Throughout the negotiations, the parties consistently were unable to agree on the wage rate of the Meadow Gold employees if they were transferred. In fact, negotiations continued through October, 1988, but an agreement was never reached. *See supra* pages 4-6.

Based on these facts, the parties were deadlocked in March 1988 after three months of negotiations. The parties were unable to reach a compromise on the issue of maintenance of the Meadow Gold rates upon transfer to the Farmer Jack facility. Obviously,

compensation is of the greatest importance, and no argument can be made here that the issue which deadlocked the parties was anything but crucial. Borden began its consolidation of operations in May 1988, two months after the deadlock. Thus, an impasse in negotiations had occurred and Borden's unilateral implementation of the terms and conditions of the Farmer Jack facility to the Meadow Gold employees occurred well after the impasse occurred. Substantial evidence does not support the Board's decision, and the Tenth Circuit erred in affirming the decision.

In sum, the Tenth Circuit ignored existing precedents in holding that Borden did not lawfully implement its last offer because it did not credit the Meadow Gold employees' seniority, and ignored substantial evidence that Borden and the Teamsters had reached impasse in their negotiations. For these reasons, this Court should grant Borden's Petition for Writ of Certiorari.

III.

THE TENTH CIRCUIT ERRONEOUSLY HELD THAT THE BOARD'S RULE SHOULD APPLY RETROACTIVELY TO BORDEN.

A. General Principles

The retroactive application of a Board decision "must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

Five factors aid courts in balancing the mischief of not allowing retroactive application against the ill effect of allowing retroactive application:

1) whether the particular case is one of first impression;

2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law;

3) whether and to what extent the party against whom the new rule is applied relied on the former rule;

4) whether and to what extent the new rule imposes a burden on a party; and

5) whether and to what extent there is a statutory interest in applying a new rule despite the reliance of a party on the old standard.

Stewart Capital Corp. v. Andrus, 701 F.2d 846, 848 (10th Cir. 1983); *Southwestern Public Service Co. v. Federal Energy Regulatory Comm'n,* 842 F.2d 1204 (10th Cir. 1988).

B. Application to Present Case

With regard to the first factor, there is no dispute that this is a case of first impression. App. at 15a, 21a (10th Cir.). With regard to the second factor, Borden argues that the new rule is an abrupt departure from a well-established principle. The Tenth Circuit states that "[i]nasmuch as there was no 'former' rule which would have allowed Borden unilaterally to implement the Borman CBA with respect to the Meadow Gold employees, Borden's claim that it relied on an 'old standard' to its detriment rings hollow . . . ." App. at 21a (10th Cir.). Never before has the Board required an employer to maintain two sets of terms and conditions of employment for employees in the same unit following a corporate change. The principle easily discernable from the Board's accretion, relocation, consolidation and successorship cases is that a single set of terms and conditions of employment, as determined

by the majority, applies to all employees. In fact, the Board's Division of Advice agreed that, based on established precedent, Borden did not have an obligation to transfer the Meadow Gold contract with the Meadow Gold employees. In sum, it is apparent that the Board's new rule is an abrupt departure from principles established by the Board, the Tenth Circuit and this Court, and the Tenth Circuit ignored established precedent.

With regard to the third factor, as discussed *supra*, there can be little doubt that Borden relied on the former rule, just as the Board's Division of Advice relied on the rule; and, in fact, Borden relied on the Board's Advice Memorandum during the latter half of its consolidation.

Further, the Tenth Circuit held that the Board's new rule does not impose any great burden on Borden because Borden itself negotiated the agreement. App. at 21a (10th Cir.). The Tenth Circuit ignored compelling facts to the contrary and common sense in its treatment of the issue. Borden negotiated the Meadow Gold contract under the circumstances existing at Meadow Gold. Under those circumstances, the union was able to obtain substantial concessions from Borden. The Farmer Jack terms and conditions of employment were likewise negotiated with the circumstances existing at that facility in mind. In that situation, the union was not able to obtain concessions as significant as those in the Meadow Gold situation. The Board's new rule requires Borden to apply contract terms which are undeniably more favorable than the circumstances warrant. To hold that this imposes no great burden on Borden is disingenuous.

The Tenth Circuit went on to state that any burden falls equally on the Teamsters because the Teamsters argued for a rule that would have been more beneficial for its constituents. App. at 22a (10th Cir.). First, this fact, even if true, is simply irrelevant for the present determination. Second, as the Tenth Circuit acknowledges, "the Act is not intended to serve either party's individual interest."

First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 680-81 (1981). Thus, Borden does not argue that the terms of the Meadow Gold contract in and of themselves impose a burden. It is the imposition of the contract in a situation which was not contemplated that imposes the burden. The Tenth Circuit ignored the obvious impact of the Board's new rule in reaching its decision.

Finally, the Tenth Circuit found that Borden's unilateral action "directly conflicted with the overarching objectives of the National Labor Relations Act of promotion and protection of employee free choice and labor relations stability," and held that "there is a strong statutory interest in applying the Board's ruling to Borden in the present case." App. at 22a (10th Cir.). As discussed *supra*, the court's reliance on labor relations stability is misleading. The Board's new rule does not promote labor stability. It allows employees with the same seniority performing the same job duties at the same location to receive different compensation and benefits. Further, it requires an employer to honor an agreement which was not negotiated with the existing economic situation in mind.

It is also difficult to imagine how Borden's unilateral action conflicts with employee free choice. The Teamsters and Borden negotiated regarding the transfer of the Meadow Gold employees to the Farmer Jack facility, but failed to reach an agreement. Further, the Teamsters and Borden were negotiating a new contract to cover the new unit at the Farmer Jack facility. If the Meadow Gold employees had been under a less favorable contract, it seems inconceivable that the court would hold that saddling those employees with that contract protects employee free choice. The fact of the matter is the employees did not have much choice in this situation. Borden decided to close its Meadow Gold facility. It engaged in good-faith bargaining about the effects of the closure, and the new contract covering the new unit. It did everything possible to provide the Meadow Gold employees with an opportunity to determine their terms and conditions of

employment. It is simply not plausible that Borden's actions conflict with protection of employee free choice.

C. Presumption Against Retroactivity

Both this Court and other courts have placed great weight on the abhorrence in law of retroactive application of a new rule. Recently, this Court stated:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497 (1994) (footnote and citation omitted); *see also, e.g., Rivers v. Roadway Express, Inc.,* 114 S. Ct. 1510 (1994); *NLRB v. Majestic Weaving Co.,* 355 F.2d 854, 860 (2d Cir. 1966) ("[A] decision branding as 'unfair' conduct stamped as 'fair' at the time the party acted, raises judicial hackles . . . .").

Retroactive application of the new rule in the present case raises the same concerns that this Court has previously addressed.

Although the present case is one of first impression, the Board's new rule nevertheless "brands" Borden's conduct as "unfair" even though the conduct was "fair" when done, and imposes additional financial burdens on Borden. Obviously, Borden could have avoided its present situation had it known the Board's new rule. This is exactly the type of case where retroactive application of a new rule is not warranted.

In sum, the Tenth Circuit ignored substantial facts which indicate that the Board's new rule should not apply retroactively to Borden. In so doing, the court also ignored warnings about retroactive application of such a rule by this Court and other courts. For these reasons, this Court should grant Borden's Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated above, Borden requests this Court grant its Petition for Writ of Certiorari to decide these important issues of federal law. If the Petition is granted, Borden intends to ask the Court to reverse the Tenth Circuit decision, and to remand in light of the evidence on the record and the Court's decision.

Respectfully submitted,

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APPENDIX A — OPINION OF THE TENTH CIRCUIT COURT OF APPEALS FILED MARCH 15, 1994

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92-9548

BORDEN, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

No. 92-9559

LOCAL 222, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

Intervenor/Petitioner

On Petition For Review From
The National Labor Relations Board

Marilyn O'Rourke, Washington, D.C. (Frederick C. Havard, Supervisory Attorney, with her on the brief), for respondent/cross-petitioner, National Labor Relations Board.

William F. Schoeberlein, Harding & Ogborn, Denver, Colo.

Appendix A

(Keith King, Counsel, Borden, Inc., Columbus, Ohio, with him on the brief), for petitioner/cross-respondent, Borden, Inc.

Stephen W. Cook, Cook & Davis, Salt Lake City, Utah, for petitioner, Local 222, International Brotherhood of Teamsters, AFL-CIO.

Before McKAY, HOLLOWAY, AND GARTH,* Circuit Judges.

GARTH, Circuit Judge.

Both Local 222, International Brotherhood of Teamsters, AFL-CIO ("Union") and Borden, Inc. ("Borden") have petitioned for review of an order entered by the National Labor Relations Board ("Board") on July 31, 1992. The Board has cross-petitioned for enforcement of its order.

I

A.

The order promulgated by the Board held that Borden had violated: 1) section 8(a)(5) of the National Labor Relations Act (the "Act") by unilaterally changing the terms and conditions of employment of employees transferred from Borden's Meadow Gold facility to its Farmer Jack facility and compensating them at the Farmer Jack wage rates; 2) section 8(a)(3) of the Act by constructively discharging those Meadow Gold employees who declined employment at Farmer Jack rather than accept lower wages at Farmer Jack; 3) section 8(a)(5) of the Act by promising

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* The Honorable Leonard I. Garth, Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Meadow Gold employees increased benefits if they abandoned the Union; and 4) section 8(a)(5) of the Act by threatening to lay off or refusing to transfer Meadow Gold employees unless the Union accepted Borden's last bargaining offer.

The Union contends that the Board erred in finding that a new unit was created following the consolidation of Borden's Farmer Jack and Meadow Gold dairy facilities and that the Board should have required Borden to apply the Meadow Gold collective bargaining agreement ("CBA") to the consolidated Farmer Jack facility under accepted principles of accretion. Borden argues that, after bargaining in good faith to impasse, it lawfully implemented the Farmer Jack terms and conditions of employment with respect to the transferred Meadow Gold employees.

Borden and the Union both challenge the Board's application of a rule requiring Borden to maintain separate terms and conditions of employment with respect to employees transferred from the Meadow Gold facility to the Farmer Jack facility, pending negotiation of a new CBA covering all of the employees at the Farmer Jack plant.

The Board seeks enforcement of its July 31, 1992 order.

B.

We have jurisdiction over the parties' petitions for review pursuant to § 10(f) of the Act, 29 U.S.C. § 160(f), and over the Board's cross-application for enforcement pursuant to § 10(e) of the Act, 29 U.S.C. § 160(e). We will deny both Borden's and the Union's petitions for review and we will grant the Board's cross-application for enforcement of its July 31, 1992 order.

Appendix A

II

Before reaching the merits of the parties' arguments, we briefly summarize the events giving rise to the present litigation, and the procedural path the Union's original complaint has followed on its way to this court. As counsel noted at oral argument, the facts in this case are, for the most part, undisputed. Only the consequences that should attach to those facts are at issue.

A.

This matter arose out of three unfair labor practices charges lodged by the Union with the National Labor Relations Board concerning events which commenced in the fall of 1986.

On or about October 9, 1986, Borden purchased Beatrice, Inc.'s Meadow Gold dairy plant in Salt Lake City, Utah from Kohlberg, Kravis and Roberts, an investment firm that had acquired Beatrice and was selling off its assets. Borden replaced Beatrice in on-going labor negotiations with the Teamsters union representing the Meadow Gold employees, and eventually reached agreement with the Union on a CBA covering the period from May 1, 1987 through November 1, 1990.

On or about November 7, 1987, Borden purchased the Farmer Jack facility, another Salt Lake City dairy plant, from Borman Acquisition Group ("Borman"). The Farmer Jack employees were also represented by the Union, which had negotiated a CBA with Borman covering the period April 10, 1987 through April 30, 1992. From Borden's point of view, the terms of the Borman CBA were more favorable to the company than those contained in the recently negotiated Meadow Gold CBA.

Appendix A

On November 10, 1987, Borden officials met with Union representatives and confirmed its acquisition of the Farmer Jack plant, its recognition of the Union, its intention to assume and apply the Borman CBA, and its intention to consolidate the Meadow Gold and Farmer Jack operations at the Farmer Jack facility. On November 12, 1987, the Union sent Borden a letter requesting that the parties meet to negotiate the wages and working conditions of all employees at the Meadow Gold and Farmer Jack facilities. The Union's letter also requested that "the present Farmer Jack Labor Agreement not be unilaterally altered by [Borden] pending completion of these negotiations."

In January 1988, Borden and the Union began negotiating in earnest over a new labor contract covering the Farmer Jack facility and mutually acceptable terms for transferring Meadow Gold employees to the Farmer Jack plant. They were unable to reach agreement.

In February 1988, Borden held two direct meetings with Meadow Gold employees at which it informed the employees that its last offer to the Union, on January 13, 1988, was final and that failure to reach agreement on it would leave Borden with no choice but to lay off the employees at Meadow Gold and to "hire from the street" at Farmer Jack. Borden and the Union met again in March, May, and October 1988 without success.

On or about October 7, 1988, Borden ceased production at the Meadow Gold facility. Meadow Gold employees either were laid off or took early retirement. Borden, however, selectively "rehired" a number of the Meadow Gold employees to work at the Farmer Jack plant at their same or similar jobs. Borden applied the Farmer Jack contract to all of the Farmer Jack workers, including

the former Meadow Gold employees.[1]

During this period — on February 26, March 11, and April 7, 1988 — the Union filed a series of complaints against Borden alleging unfair labor practices in violation of the National Labor Relations Act § 8(a)(1) (interfering, restraining, or coercing employees in the exercise of their rights), § 8(a)(3) (using discriminatory hiring or labor practices to encourage or discourage union membership), and § 8(a)(5) (refusing to bargain collectively with employee representatives).[2] The Union's complaints

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1. The work force at the Farmer Jack plant as of October 7, 1988 consisted of 35 former Meadow Gold employees, 31 original Farmer Jack employees, and 13 new hires.

2. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in relevant part as follows:

(a) it shall be an unfair labor practice for an employer —

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

ultimately were consolidated by order of the Board on June 15, 1989.[3]

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3. The Union's consolidated complaint alleged the following:

* * * *

(5) On or about March 9, 1988, at [Borden's] Meadow Gold facility, [Borden], acting through Anthony Ward, told employees that it would not transfer any Salt Lake City Meadow Gold employees to the Farmer Jack facility unless the Union would agree that the Farmer Jack contract applied to all employees at that facility [in violation of § 8(a)(1) of the Act].

(6) On or about September 26, 1988, [Borden] discharged its Meadow Gold employees and rehired certain of these employees as new hires at its Farmer Jack facility [in violation of §§ 8(a)(1) and (3) of the Act].

(7) [Borden] engaged in the acts and conduct described above in paragraph 6, because the employees therein joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and because the Union would not agree that the Farmer Jack contract applied to all employees at that facility.

* * * *

(8) On or about November 12, 1987, and continuing to date, the Union has requested, and is requesting,

(Cont'd)

Appendix A

B.

The Union's consolidated complaint initially was heard

(Cont'd)

> [Borden] to bargain collectively with it as the exclusive collective-bargaining representative of the employees in the [Meadow Gold and Farmer Jack] Units . . . with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.
>
> (12) Since on or about November 12, 1987, [Borden] has failed and refused to recognize and bargain collectively with the Union as the exclusive collective bargaining representative of its [Meadow Gold and Farmer Jack] Units . . . by the following acts and conduct [in violation of §§ 8(a)(1) and (5) of the Act]:
>
> (a) Since on or about November 12, 1987, [Borden] unilaterally implemented the [Borman] collective-bargaining agreement . . . at its Farmer Jack facility without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of [Borden]'s employees in the Farmer Jack Unit.
>
> (b) On or about September 26, 1988, [Borden] unilaterally changed the terms and conditions of employment of the employees in the Meadow Gold Unit by unilaterally implementing the [Borman] collective-bargaining agreement . . . as to those Meadow Gold employees who became employed by [Borden] at its Farmer Jack facility.
>
> (c) On or about January 27, 1988, [Borden] bypassed the Union and dealt directly with its employees by offering improved wages and benefits to its Salt Lake City Meadow Gold clerical employees if they agreed to work non-union at [Borden's] Farmer Jack facility.

before an Administrative Law Judge ("ALJ") in September 1989. The ALJ ruled that the [sic] Borden had committed unfair labor practices in violation of § 8(a)(5) of the Act by making impermissible promises to Meadow Gold clerical employees of increased benefits and wages if they abandoned the Union and the Meadow Gold CBA, and by improperly attempting to bargain with the Union by exerting pressure directly on Meadow Gold employees.

The ALJ found that the Farmer Jack negotiating unit could stand alone as a separate bargaining unit as of the time of acquisition and that, therefore, when the two plants were consolidated, Farmer Jack was neither an accretion to, nor a relocation of, the Meadow Gold unit. Rather, the ALJ found that the Meadow Gold employees had, in effect, been transferred to the Farmer Jack plant and that, upon consolidation, the separate units of dairy production employees became a single unit, different and independent from the two pre-existing units.

The ALJ also found that the Union, in its November 12, 1988 letter to the company, consented to Borden's application of the Borman CBA at the Farmer Jack plant, pending the negotiation of a new labor contract. Consequently, the ALJ held that the Union's claim that Borden committed an unfair labor practice by unilaterally assuming the Borman CBA was unfounded.

Finally, the ALJ found that the Union had not consented to Borden's implementation of the Borman CBA with respect to the transferred Meadow Gold employees upon consolidation of the two dairy plants. Nor was the Borman CBA instituted by Borden pursuant to an impasse in negotiations since, according to the ALJ, Borden's "implementation of the [Borman] contract was a course of conduct undertaken from the time of its acquisition of the

[Farmer Jack] facility and was not initiated after some later argued impasse in bargaining." The ALJ ruled, however, that Borden was not legally obligated to maintain the Meadow Gold terms and conditions of employment and that, therefore, Borden had not committed and unfair labor practice by unilaterally changing the terms and conditions of employment of the transferred Meadow Gold employees.

C.

The General Counsel, Borden, and the Union filed exceptions to the ALJ's decision with the National Labor Relations Board. The Board affirmed the ALJ's rulings, findings, and conclusions, subject to one major modification.

The Board found that Borden had presented no justification for unilaterally terminating the Meadow Gold employees' terms and conditions of employment. The Board held that Borden was, in fact, obligated to preserve the Meadow Gold CBA with respect to the transferred Meadow Gold employees while the parties bargained in good faith to agreement or impasse over a new CBA covering the consolidated unit.

Consequently, the Board upheld paragraph 12(b) of the Union's complaint, finding that Borden had violated § 8(a)(5) of the Act by unilaterally changing the terms and conditions of employment of the Meadow Gold employees. The Board also reversed the ALJ's dismissal of paragraph 6 of the Union's complaint, finding that as a result of Borden's unilateral application of the Farmer Jack CBA to the Meadow Gold employees, those Meadow Gold employees who retired, rather than accept reduced benefits at Farmer Jack, were constructively discharged from their jobs in violation of § 8(a)(3) of the Act.

Appendix A

D.

Borden seeks review of the Board's order requiring it to apply the Meadow Gold terms and conditions of employment to the former Meadow Gold employees, and the Farmer Jack terms and conditions of employment to the Farmer Jack employees, pending the negotiation of a new agreement covering the consolidated Farmer Jack operations.

The Union seeks review of the ALJ's and the Board's findings that the Farmer Jack employees were not accreted into the Meadow Gold negotiating unit, that Borden had negotiated in good faith with the Union, and that the Union had consented to Borden's assumption of the Borman CBA when the company acquired the Farmer Jack facility in November 1987.

The Board cross-appeals for enforcement of its order. The Board seeks summary enforcement of its uncontested findings that Borden committed unfair labor practices by attempting to deal directly with, by making material misrepresentations to, and by threatening to lay off or refuse to transfer, Meadow Gold unit employees. *See Intermountain Rural Electric Association v. N.L.R.B.*, 732 F.2d 754, 756 (10th Cir. 1984) (granting summary enforcement of Board's uncontested findings).

E.

As always, it is helpful for us first to delineate the standard we apply in reviewing the decisions of the Board and ALJ. *See generally Intermountain Rural Electric Association v. N.L.R.B.*, 984 F.2d 1562, 1566 (10th Cir. 1993).

The Board's findings of fact are conclusive when supported

by substantial evidence in the record considered as a whole. *Monfort, Inc. v. N.L.R.B.*, 965 F.2d 1538, 1540 (10th Cir. 1992); *United Steelworkers of America, AFL-CIO-CLC, Local Union 14534 v. N.L.R.B.*, 983 F.2d 240, 244 (D.C. Cir. 1993). Where the Board's resolution of conflicting interpretations of the National Labor Relations Act is defensible, it is entitled to considerable deference. *N.L.R.B. v. Viola Industries-Elevator Division, Inc.*, 979 F.2d 1384, 1391 (10th Cir. 1992). That is, if the Board's, application of a rationale rule is supported by substantial evidence, we will enforce its order. *Central Soya Co., Inc. v. N.L.R.B.*, 867 F.2d 1245, 1247 (10th Cir. 1988). When the ALJ and the Board have reached contrary conclusions, our standard of review remains the same. *Intermountain Rural Electric Association v. N.L.R.B.*, 984 F.2d at 1566 (10th Cir. 1993).

III

At the outset, we can dispose of both Borden and the Union's objections to the Board's determination with respect to transfer and accretion. The Union argues that the Board erred in finding that a new negotiating unit was created upon the consolidation of the Farmer Jack and Meadow Gold plants. It claims that the Farmer Jack employees accreted into the Meadow Gold negotiating unit and that, therefore, the Meadow Gold CBA should apply to all employees. Borden argues that the Board erred in finding that the former Meadow Gold employees had been "transferred" to the Farmer Jack plant. It claims that the Meadow Gold employees were, in fact, "new hires," and that, therefore, the Borman CBA should apply to all employees.

A.

In *Central Soya Co., Inc. v. N.L.R.B.*, 867 F.2d 1245 (10th Cir.

1988), we noted that when new employees "share a 'community of interest' with unit employees and have no separate identity, they are then properly accreted into the [extant] bargaining unit and governed by its selected representative." *Id.* at 1248 (upholding Board's accretion and unfair labor practice findings where company withdrew recognition of existing bargaining unit of unionized employees that was consolidated with non-unionized employees at newly acquired facility). Conversely, where employees have a separate identity, or lack a community of interest, accretion is inappropriate. As we recognized in *Central Soya,* "[t]he determination of whether a group of employees should be accreted into a bargaining unit involves the discretion of the Board, and that determination will not be set aside unless the Board has acted in an arbitrary and capricious manner." *Id.* at 1247.

Here, the Board explicitly adopted the ALJ's finding that "the Farmer Jack unit could stand alone as a separate bargaining unit as of the time of acquisition" and should not be accreted into the Meadow Gold negotiating unit. The ALJ based his decision on the fact that the Farmer Jack unit was "an existing operation which had been owned by two previous entities and was taken over by [Borden] as an independent operating facility with all its equipment, supervisory staff, markets and procedures in place and operating." Such an entity, the ALJ found, was capable of existing independently as a separate bargaining unit.

Despite the Union's charges to the contrary, the ALJ's reasoned determination that Farmer Jack was capable of operating independently of the Meadow Gold facility was supported by the overwhelming weight of the evidence. Farmer Jack was, in fact, operated independently by Borman prior to its acquisition by Borden. The Union's allegation that the ALJ's characterization of the Farmer Jack operation was in error, or an abuse of discretion, is without foundation.

B.

In addition, the Board's and the ALJ's finding that Borden's lay off and rehiring of Meadow Gold employees was "tantamount to a transfer" is buttressed by the evidence presented by the parties. Borden does not deny that it rehired Meadow Gold employees. The company merely claims that its action cannot be categorized as a "transfer" since the terms of the Meadow Gold CBA did not provide for the transfer of employees.

Nevertheless, the Union clearly established, and the ALJ found, that Borden had solicited its former Meadow Gold employees to work at Farmer Jack, informed them of the requisite procedures for obtaining a position, and had them resume work at Farmer Jack, in the same or similar positions, virtually without any time missed.

Notwithstanding Borden's claim that it was not legally obliged to transfer the Meadow Gold employees to the Farmer Jack plant, the fact remains that Borden did engage those employees. The ALJ and the Board's decisions classifying Borden's actions as a "transfer" were supported by substantial evidence and will be upheld.

IV

The Board's decision to compel Borden to apply bifurcated terms and conditions of employment at the Farmer Jack facility pending the negotiation of a new CBA presents a somewhat thornier problem.

Appendix A

A.

Borden argues that the Board erred in requiring it to maintain the Meadow Gold CBA with respect to the former Meadow Gold employees, pending negotiation of new terms and conditions of employment covering all the employees at the consolidated Farmer Jack facility. Conversely, the Union argues that the Board should have ordered Borden to apply the Meadow Gold CBA to all of the workers at Farmer Jack facility. We are not persuaded by the arguments of either party.

The facts of this case appear to present a question of first impression: where, by reason of a reorganization, an employer consolidates the operations of formerly independent facilities, the employees of which are represented by the same union but covered by different CBA's, can the terms and conditions of employment as provided in each of the CBA's entered into by the company prior to the consolidation apply to each of the components of the new entity, pending negotiation of a new CBA which would cover all the employees of the new entity?

1.

Borden points to the line of "accretion" and "relocation" cases previously advanced by the Union and argues that the overriding principle in those cases — i.e., application of the same conditions of employment to all employees consolidated in a relocated unit — should apply in the present context as well. Borden relies quite heavily on the Supreme Court's decision in *N.L.R.B. v. Burns International Security Services., Inc.*, 406 U.S. 272 (1972).

In *Burns,* Burns had taken over the security duties for Lockheed Aircraft from Wackenhut Corporation and, in the

process, hired a majority of Wackenhut guards. The Court held that while a successor employer is obligated to recognize and bargain with an incumbent (i.e., Wackenhut) union, it is not bound by the substantive provisions of a CBA negotiated by the employer's predecessor to which the new employer did not consent.

Borden argues that the "upshot" of the *Burns* opinion is that because Burns was not bound to maintain separate terms and conditions of employment for the Wackenhut group and the Burns group of employees, Borden should not have to maintain separate terms and conditions of employment as to both the Meadow Gold employees and the Farmer Jack employees. We, however, find inapposite.

Borden, in fact, had an opportunity to renounce the CBA's negotiated by its predecessors, Beatrice and Borman, when it first acquired Meadow Gold and Farmer Jack. Borden, however, chose to negotiate a new CBA with the Meadow Gold employees, and it eagerly assumed the Borman contract with respect to the Farmer Jack employees. Borden fails to call our attention to any case in which an employer who had engaged in a corporate reorganization was released from a CBA it had negotiated itself, or to which it had consented.

2.

The Board directs us to a number of analogous cases in support of its position that each plant's terms and conditions of employment should remain applicable to its respective employees at Farmer Jack pending the negotiation of a new CBA.

In *Federal-Mogul Corporation,* 209 N.L.R.B. 343 (1974), 140 non-unionized setup men, who were specifically excluded

from the CBA between the company and its 2,000 unionized machine workers, voted to join the union. The company proceeded unilaterally to apply the terms of the CBA to the setup men. The Board held that, in so doing, the company had committed an unfair labor practice. The Board stated that it did "not perceive either logical or practical justification for permitting either party to escape its normal bargaining obligation upon the theory that this newly added group must somehow be automatically bound to terms of a contract which, by its very terms, excluded them." *See also Wells Fargo Armored Service Corp.*, 300 N.L.R.B. 1104 (1990) (holding new union members do not come automatically under terms of CBA covering old union members).

Likewise, in *Bay Medical, Inc.*, 239 N.L.R.B. 731 (1978), the Board held that where the corporate owner of two hospitals had been obligated to negotiate with nurses from two hospitals as individual units, the unrepresented nurses from one hospital could not be deemed to come automatically under the terms of the existing CBA covering the represented nurses at the second hospital when the former chose to join the latter in a single bargaining unit.

We observed in *Intermountain Rural Electric Association v. N.L.R.B.*, 984 F.2d at 1566 (10th Cir. 1993), that once a CBA expires, an "employer is obligated to maintain the status quo unless and until a new agreement is reached or the parties negotiate in good faith to impasse." To allow a company to renounce terms and conditions of employment it had negotiated itself would encourage companies to reorganize and consolidate for the sole purpose of relieving themselves of onerous CBA's. Such an incentive would be contrary to the overriding purpose of the National Labor Relations Act, i.e., that employers and employees should bargain with each other over terms and conditions of employment. 29

U.S.C. § 141. *See, e.g., Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 498 (1979).

3.

The Union's solution, that the Meadow Gold CBA should be applied to all of Borden's employees, is no more satisfying than that proposed by the company. The Union, no less than Borden, is obliged to abide by the terms of the existing CBA until the parties negotiate a new labor agreement.

Notwithstanding the parties' other contentions, discussed below, the Board's solution — to maintain the status quo and hold Borden to the terms of the CBA's to which it had voluntarily agreed — neatly balances the interests of the employer, the employees, and the National Labor Relations Act.

Borden's allegation that the maintenance of two separate terms and conditions of employment is unworkable in practice, is not convincing. We recognize that the solution proposed by the Board, and affirmed by us today, will create a less-than-ideal situation. As the Board noted, however, rather than promote industrial unrest, experience suggests that this bifurcated status quo "is more likely to prompt both parties to negotiate an agreement expeditiously."

B.

Borden argues that the Board erred in applying its bifurcation rule retroactively inasmuch as, according to Borden, the Board's ruling represents a departure from the rule we stated in *Central Soya Co., Inc. v. N.L.R.B.*, 867 F.2d 1245 (10th Cir. 1988) (holding in accretion case that representation rights follow the majority of

employees). The Board answers that the instant case merely involves a unique factual situation and that, therefore, Borden's contentions with respect to the Board's retroactive application of a "new" rule are without merit.

We agree that the question of retroactivity does not arise in the present case. The Board has not overruled any controlling precedent upon which Borden relied to its detriment. We noted above that *Central Soya,* an accretion case, simply is inapposite. There was never any legal justification for Borden's application of the Borman contract to the Meadow Gold employees. The Board's order merely recognizes this fact.

In any event, even if retroactivity were implicated here, which we hold it was not, Borden has failed to persuade us that the Board's order should not be applied retroactively. The Supreme Court has recognized that "problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule." *S.E.C. v. Chenery Corp.,* 332 U.S. 194, 202 (1947). In *Chenery,* the Court held as follows:

> [W]e refuse to say that the [S.E.C.], which has not previously been confronted with the problem of management trading during reorganization, was forbidden from . . . announcing and applying a new standard of conduct. That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be

> balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Id. at 203.

We have adopted a five-factor balancing test to determine whether an agency's ruling should be applied retroactively. *Stewart Capital Corp. v. Andrus,* 701 F.2d 846 (10th Cir. 1983); *Southwestern Public Service Co. v. Federal Energy Regulatory Commission,* 842 F.2d 1204, 1208-1209 (10th Cir. 1988). Those factors are as follows:

> 1. Whether the case is one of first impression;
>
> 2. Whether the new rule is an abrupt departure from well-established practice or merely an attempt to fill a void in an unsettled area of law;
>
> 3. Whether and to what extent the party against whom the new rule is applied relied on the former rule;
>
> 4. Whether and to what extent the retroactive order imposes a burden on a party; and

> 5. Whether and to what extent there is a statutory interest in applying a new rule despite reliance of a party on an old standard.

Balancing these five factors, we find Borden's arguments unpersuasive.

We agree that this case presents quite a novel set of circumstances and, accordingly, rightfully is classified as one of first impression (factor one). Nevertheless, the Board's ruling clearly was an attempt to fill a void created by the unprecedented factual situation presented by this case, and was not an abrupt departure from well-established practice (factor two).

The relevant general principles of law *are* well established. Employers and employees are required to abide by labor agreements to which they have agreed or consented. When a collective bargaining agreement expires, an employer is required to maintain the status quo until a new agreement is reached. *Intermountain Rural Electric Association v. N.L.R.B.*, 984 F.2d at 1566 (10th Cir. 1993). Inasmuch as there was no "former" rule which would have allowed Borden unilaterally to implement the Borman CBA with respect to the Meadow Gold employees, Borden's claim that it relied on an "old standard" to its detriment rings hollow (factor three).

In addition, since Borden itself negotiated the Meadow Gold CBA after acquiring the Meadow Gold facility from Beatrice, we would not be imposing any great burden on the company by compelling it to fulfill the terms of that contract, pending negotiations of a new agreement (factor four). *See N.L.R.B. v. Viola Industries-Elevator Division, Inc.*, 979 F.2d 1384, 1396 (10th Cir. 1992) (en banc); *International Association of Bridge, Structural*

& Ornamental Iron Workers, Local 3 v. N.L.R.B., 843 F.2d 770, 781 (3d Cir. 1988).

Finally, Borden fails to note that the burden of this bifurcated status falls equally upon the shoulders of the Union. They too have petitioned this court to adopt a rule more favorable to the interests of their constituents. Nevertheless, as the Supreme Court has stated, "the Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interest may be resolved." *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 680-81 (1981). Inasmuch as Borden's unilateral actions directly conflicted with the overarching objectives of the National Labor Relations Act of promotion and protection of employee free choice and labor relations stability, *N.L.R.B. v. Viola Industries-Elevator Division*, 979 F.2d at 1395 (10th Cir. 1992), we find that there is a strong statutory interest in applying the Board's ruling to Borden in the present case (factor five).

Having balanced the relevant factors, we conclude that the Board's rule conforms with well-recognized principles of labor law, and that its impact does not discriminate between the parties to this litigation. Consequently, application of the Board's ruling to Borden is reasonable under the present circumstances.

V

Borden argues in the alternative that it lawfully implemented the Farmer Jack terms of employment in the course of good-faith bargaining after impasse. In particular, Borden alleges that after March 1988, both parties maintained their bargaining positions and that negotiations were deadlocked.

Appendix A

The Union claims that the Board erroneously found that Borden had negotiated in good faith over the closure of the Meadow Gold facility, and that the Union had consented to the application of the Borman CBA to the Farmer Jack facility prior to consolidation. Because a finding of good-faith negotiations is a pre-requisite to a finding of impasse, we will discuss the Union's contentions first.

A.

Good-faith negotiations demand that the parties "enter into discussions with an open mind and a sincere intention to reach an agreement consistent with the respective rights of the parties." *United Steelworkers of America v. N.L.R.B.*, 983 F.2d at 245 (D.C. Cir. 1993). "While parties to a negotiation are 'not required to make concessions or to yield any position fairly maintained,' 'rigid adherence to disadvantageous proposals *may* provide a basis for inferring bad faith' " *Teamsters Local Union No. 515 v. N.L.R.B.*, 906 F.2d 719, 726 (D.C. Cir. 1990) (citing cases) (emphasis in the original). The Board's determination of whether a party has negotiated in good faith should be based on the "totality of the circumstances," *N.L.R.B. v. Schwab Foods, Inc.*, 858 F.2d 1285, 1292 (7th Cir. 1988) and will not be upset if supported by substantial evidence. *Albion Corp. v. N.L.R.B.*, 682 F.2d 874, 876 (10th Cir. 1982).

The ALJ's opinion scrupulously delineated the course of negotiations between Borden and the Union. Quite clearly, the negotiations focused on the Union's desire to save the worker-friendly terms of the Meadow Gold CBA, and Borden's desire to maintain and continue the economically favorable terms of the Borman CBA. The ALJ found that while Borden was willing to accede to the Union's proposals regarding dovetailing of seniority,

it nevertheless tried to preserve the favorable economic terms of the Borman contract. It sought to do so by offering employees one-time payments in place of concrete wage increases.

The parties met on numerous occasions to discuss a new CBA and terms for transferring the Meadow Gold employees.[4] By all accounts, the bargaining was resolute. Nevertheless, a party is not obligated to make concessions nor yield any position fairly maintained. Borden was entitled to insist on the favorable terms of the Borman contract. Considering the totality of the circumstances, we hold that the ALJ's finding, affirmed by the Board, that Borden negotiated with the Union in good faith, was supported by substantial evidence.

B.

This brings us to Borden's contention that negotiations had reached an impasse. As a matter of law, an employer has the right to implement all or part of its final offer with respect to a mandatory subject of bargaining upon an impasse in negotiations. *Colorado-Ute Electric Association, Inc. v. N.L.R.B.*, 939 F.2d 1392, 1404 (10th Cir. 1991). An impasse occurs where the parties, after good-faith negotiations, have exhausted all prospects of concluding an agreement. *Intermountain Rural Electric Association v. N.L.R.B.*, 984 F.2d at 1569 (10th Cir. 1993). The Board's decision that an impasse does or does not exist is a question of fact that will not be upset if supported by substantial evidence. *Id.* at 1570; *United*

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4. The Board's ruling that Borden had committed unfair labor practices by meeting directly with the employees does not compel our finding bad faith. We noted in *Intermountain Rural Electric Association v. N.L.R.B.*, 984 F.2d at 1569 (10th Cir. 1993), that "[t]here is no presumption that an employer's unfair labor practice automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching good-faith impasse."

Appendix A

Steelworkers of America v. N.L.R.B., 983 F.2d at 246 (D.C. Cir. 1993).

1.

The requirement that a genuine impasse precede unilateral action can be waived by the union, as long as the waiver is expressed clearly and unmistakably. *Intermountain Rural Electric Association v. N.L.R.B.*, 984 F.2d at 1566-67 (10th Cir. 1993). The Board's decision that the Union has waived its rights is a question of fact that will be upheld if supported by substantial evidence in the record. *Id.*

The Union's letter to Borden of November 12, 1988,[5] was reasonably interpreted by the ALJ as a request by the Union that

5. The Union's letter provided as follows:

> It has come to my attention that a sale of the assets of Farmer Jack Cultured Products, Milk & Ice Cream Plants has occurred. It is my further understanding that your company has acquired the full compliment of bargaining unit employees previously under contract with Farmer Jack.
>
> The purpose of this letter is to request an immediate meeting to negotiate the wages, hours, and working conditions of all employees (all Farmer Jack and Meadow Gold) affected by this sale. Further, this letter is to request that the present Farmer Jack Labor Agreement not be unilaterally altered by your company pending completion of these negotiations.
>
> I would like to hear from you in the immediate future regarding a convenient day, time, and place to commence these negotiations.

Borden not alter the Farmer Jack terms and conditions of employment. The evidence also supports the ALJ's finding that the Union never clearly revoked this waiver. The ALJ's determination with respect to waiver was supported by substantial evidence and will be upheld.

2.

Nevertheless, the Union's waiver applied only to the Farmer Jack employees, not to the transferred Meadow Gold employees. That is, Borden could not unilaterally apply the Farmer Jack CBA to the transferred Meadow Gold employees, absent an impasse in negotiations, simply because the Union consented to its application to the original Farmer Jack employees. Therefore, Borden still must establish that it negotiated to impasse with the Union over the terms and conditions of employment of the transferred Meadow Gold employees prior to instituting its last offer.

The ALJ found that an impasse in negotiations did *not* exist because Borden's "implementation of the [Farmer Jack] contract was a course of conduct undertaken from the time of its acquisition of the [Farmer Jack] facility and was not initiated after some later argued impasse in bargaining." Evidence presented by the parties bears out the ALJ's finding. The record clearly shows that Borden consistently claimed that it had "bought" the Borman contract along with the Farmer Jack plant. Borden immediately implemented the terms of the Borman CBA with respect to the Farmer Jack employees. Upon its consolidation of the Meadow Gold and the Farmer Jack facilities, Borden claimed that the Borman CBA was equally applicable to the transferred Meadow Gold employees. It proceeded to apply the terms of the Borman CBA to those employees as well.

In addition, the ALJ found that even if an impasse had existed,

Borden did not, in fact, implement its last offer, or preserve the status quo, with respect to the "transferred" and laid-off Meadow Gold employees. The ALJ noted that the "transferees" carried no seniority and received no credit for Meadow Gold employment. Thus, they were denied specific benefits of transfer which they could have received if Borden's last offer had been implemented. Consequently, the ALJ's determination, affirmed by the Board, that a *bona fide* impasse did not exist, was not clearly erroneous and will be upheld.

C.

Since we agree with the Board that Borden failed to justify its application of the Borman contract to the Meadow Gold employees, we also will affirm the Board's holding that Borden committed an unfair labor practice by constructively discharging those Meadow Gold employees who opted for early retirement over continued employment with reduced benefits at Farmer Jack.

The effect of Borden's application of the Borman contract's lower wage structure to the Meadow Gold employees was to unlawfully condition the employees' continued employment on their accepting conditions of employment inferior to those contained in the Meadow Gold CBA. *See, e.g., N.L.R.B. v. Tricor Products, Inc.*, 636 F.2d 266, 271 (10th Cir. 1980). When an employee leaves his job as a result of such an unlawful condition, the employee is considered to have been constructively discharged. *Id.*

VI

Thus, both Borden's and the Union's petitions for review will be denied and the Board's cross-application for enforcement of its July 31, 1992 order will be granted.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SDR

308 NLRB No. 25

D—3025
Salt Lake City, UT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 27—CA—10412
27—CA—10412—2
27—CA—10412—3

BORDEN, INC.

and

LOCAL 222, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL—CIO[1]

DECISION AND ORDER

At issue is whether the Respondent violated Section 8(a)(5) and (1) when, after consolidating two units represented by the Union, it, without bargaining, applied the terms and conditions of one of the original units to all of the employees in the consolidated unit.

On January 24, 1990, Administrative Law Judge Clifford H.

1. The name of the Charging Party has been changed to reflect the new official name of the Union.

Appendix B

Anderson issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[2] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to adopt the recommended Order, as modified.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally imposing terms and conditions of employment previously in effect at its newly acquired Farmer Jack milk processing plant on represented employees transferred there from its Meadow Gold milk processing plant. The Union was the collective-bargaining representative of employees at both the Farmer Jack plant and the Meadow Gold plant, but the employees constituted separate units with separate bargaining histories, and the contracts covering the two groups of employees differed. Before the two operations were consolidated, the Meadow Gold transferees had worked under an agreement with terms that were significantly more favorable for the employees.[3]

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2. The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

3. The term of the Meadow Gold contract ran from May 1, 1987, to November 1, 1990. The Farmer Jack contract, which had been negotiated by a predecessor but was assumed by the Respondent (see fn. 5 infra), was a 5-year agreement running from April 10, 1987, to April 30, 1992.

Appendix B

The judge found that the two units of employees became a single, consolidated unit at some point after the consolidation. He found no merit, however, to the General Counsel's contention that the Respondent had violated Section 8(a)(5) because it had not preserved the separate status of each portion of the new consolidated unit and applied the Farmer Jack contract to employees who had worked at the Meadow Gold or at the Farmer Jack plants.

We agree with the judge's findings that a new unit was created by the consolidation of the Meadow Gold and Farmer Jack units, that the Meadow Gold employees were in fact transferred to the Farmer Jack plant, and that the Respondent lawfully assumed the contract in effect at Farmer Jack, at the Union's request, after it purchased that plant.[4]

We disagree, however, with the judge's finding that the

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4. We also adopt the judge's findings that the Farmer Jack unit was not an accretion to the former Meadow Gold unit; the Respondent, through its general manager, Anthony Ward, violated Sec. 8(a)(5) and, independently, Sec. 8(a)(1), by promising Meadow Gold clerical employees increased benefits if they abandoned the Union; the Respondent did not violate Sec. 8(a)(3) and (1) by the layoffs and transfers to Farmer Jack of former Meadow Gold employees; and the Respondent violated Sec. 8(a)(5), but not independently Sec. 8(a)(1), by the threat to lay off or refuse to transfer employees unless the Union accepted the Respondent's last bargaining offer.

Member Devaney would delete the fourth paragraph of the notice concerning the Respondent's obligation to refrain from making "misstatements or mischaracterizations regarding negotiations" by the Board. Accordingly, Member Devaney would also find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(5) by stating to employees that it would have no choice but to lay off and/or refuse transfers to employees unless the Union accepted its last bargaining offer, as this finding is cumulative of other unfair labor practices found by the Board and would not affect the remedy.

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Respondent had no obligation to preserve the Meadow Gold transferees' preexisting terms and conditions of employment while the parties bargained in good faith to agreement or impasse with respect to the consolidated unit. The pertinent facts are as follows.

The Respondent acquired the Farmer Jack plant from Borman's Acquisition Corporation shortly after Borman's had obtained substantial monetary concessions from the Union. It had purchased the Meadow Gold plant the prior year when that plant's employees were covered by a collective-bargaining agreement that had been negotiated with the Union by then-owner Beatrice Companies, Inc. Wages and benefits under Beatrice's Meadow Gold contract were superior, from the Union's perspective, to those covering Borman's Farmer Jack unit.

From the outset of negotiations on October 12, 1987, when the contemplated purchase of Meadow Gold was announced,[5] the Respondent told the Union it intended to consolidate the plants, but that it would initially operate them independently. The Respondent stated that it would assume the Farmer Jack contract at the Farmer Jack plant. The Union took the position that, if the plants continued to operate independently, it expected the Respondent to honor both contracts,[6] but that, in the event of consolidation, the Meadow

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5. The judge found that these negotiations could be fairly characterized as either effects bargaining over the Meadow Gold cessation of operations or bargaining concerning the new merged unit.

6. The judge found that, by the November 12, 1987 letter, the Union agreed unconditionally to the Respondent's assumption of the Borman's Farmer Jack contract at that facility, including wage increases scheduled under that contract. As noted in fn. 4, supra, we adopt the judge's dismissal of the 8(a)(5) complaint allegation that the Respondent unilaterally assumed the Borman's contract.

Gold contract should apply to employees from both units thereafter. The parties discussed, but reached no agreement over, the possibility of constructing a dual wage and benefit system at the consolidated facility.

On November 6, 1987, the Respondent formally acquired the Farmer Jack plant. The next day, it commenced operations, recognized the Union in the unit covered by Borman's Farmer Jack collective-bargaining agreement, and began applying that contract at Farmer Jack. On November 10, the Respondent again met with the Union, announced its intention to proceed with the consolidation, and offered to bargain over the effects of the cessation of the Meadow Gold milk processing operations. At further bargaining sessions on January 5 and 6, the Respondent set July 1988 as its projected date to terminate the Meadow Gold operations. After further bargaining, the Respondent agreed to union proposals for transfer rights for Meadow Gold employees choosing to work at Farmer Jack and retention of seniority for those employees. It consistently, however, rejected the Union's proposal to apply Meadow Gold wage rates to employees transferred to Farmer Jack.

Ultimately, the Respondent accelerated the transfer of operations and selectively employed Meadow Gold unit employees at the Farmer Jack facility without seniority rights and at wage and benefit rates specified in the Borman's contract it had assumed at Farmer Jack.[7] When the consolidation was complete, October 7, 1988, there were 35 former Meadow Gold plant employees, 31 Farmer Jack employees previously covered by the Borman's contract, and 13 new hires. The Borman's contract was applied to all 79 of these employees.

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7. As noted above, we adopt the judge's finding that these employees were effectively transferred from Meadow Gold to Farmer Jack.

Appendix B

As a result of the consolidation, a new merged unit, different from either preexisting unit, was created at the Farmer Jack plant.[8] The judge found no obligation for the Respondent to maintain the Meadow Gold wage and benefit rates at the Farmer Jack plant on consolidation and recommended dismissal of the corresponding and related allegations. The General Counsel excepts, contending that the Respondent is obligated to maintain the status quo terms and conditions of employment of both previous units in effect at the time of consolidation while the parties bargain for a new agreement for the merged unit. The General Counsel maintains that this entails no expansion of an employer's obligations under Section 8(a)(5) because the requirement for a successor employer to preserve the status quo during bargaining is well-established. In any event, the General Counsel argues, to require maintenance of a bifurcated status quo ante in the case of a consolidation, as here, fosters stability in collective bargaining. The General Counsel further contends that certain former Meadow Gold production employees who accepted early retirement "as a direct result" of the Respondent's unlawful unilateral action were thereby constructively discharged.

The Respondent insists that the former Borman's contract in effect at Farmer Jack constitutes the status quo for the combined unit of employees. First, the Respondent argues that requiring two groups of employees to work alongside each other with dual wage and benefit structures would work against the statutory objective of industrial stability because dissension in the workplace would

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8. See *Martin Marietta Co.*, 270 NLRB 821 (1984). Because the two preconsolidation units in Martin Marietta had been represented by different unions, a question concerning representation arose, and the Board accordingly directed an election on the employer's RM petition in the consolidated unit. Because both groups of employees in the present case are represented by the same union, no such question arises.

inevitably flow from decreased employee morale among the lower paid group. Second, according to the Respondent, representation of both groups of employees in negotiation of a new contract presents the Union with a conflict of interest. Finally, the Respondent points out that, if the Board finds merit in the General Counsel's theory of violation, "it would be granting the Union the terms of its proposal to Borden."

Our rejection of the Respondent's contention that the Meadow Gold employees should automatically be brought under the terms of the Farmer Jack contract is substantially consistent with the manner in which the Board has treated the obligation of an employer respecting the terms and conditions of previously unrepresented employees who are added to a bargaining unit as a result of an *Armour-Globe* election[9] during the term of a collective-bargaining contract covering the larger unit. The newly added, or "fringe group," employees are not automatically swept under the terms of the agreement covering the existing unit. *Federal-Mogul Corp.*, 209 NLRB 343 (1974). Accord: *Wells Fargo Armored Service Corp.*, 300 NLRB No. 149, slip op. at 1-2 (1990); *Bay Medical Center*, 239 NLRB 731, 732 (1978). Rather, the union and the employer bargain over the terms and conditions under which the fringe group will work until the contract in the larger unit expires, and the status quo from which they bargain is the current working conditions of those employees. *Federal-Mogul*, 209 NLRB at 344. See also *NLRB v. Henry Vogt Machinery Co.*, 718 F.2d 802, 809 (6th Cir. 1983) (employer permitted laboratory employees who had voted to join existing unit to retain cafeteria privilege during bargaining over whether that privilege should be retained now that they were in unit of others who did not enjoy it).

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9. *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937); *Armour & Co.*, 40 NLRB 1333 (1942).

Admittedly, the present case differs in that we have determined that the consolidated operation at Farmer Jack was a new unit and not a mere continuation of an existing unit with a newly added contingent. Therefore, unlike in *Federal- Mogul* and its progeny, we have concluded that a new agreement should be negotiated for the entire new operation. But, here, as in *Federal-Mogul,* we see no "legal or practical justification for permitting either party to escape its normal bargaining obligation," which is to bargain with the employees' previous conditions of employment as the starting point. 209 NLRB at 344.[10]

We agree with the General Counsel that, where two separate units of the same employer represented by the same union contribute substantial proportions of employees to a new unit, an employer is obligated to preserve the status quo with respect to each of the two groups until it reaches either a new agreement or a bargaining impasse. Maintaining the status quo by requiring the terms of both contracts to remain in effect after a consolidation, such as the one that occurred here, promotes the statutory interest of stability in collective bargaining. Maintaining the status quo ensures that both portions of the merged unit begin from the same relative point. Like any employees in a pre-bargaining posture, they both enter negotiations with their respective preexisting terms and conditions of employment intact.

Contrary to the Respondent's argument that a bifurcated status

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10. In *NLRB v. Abex Corp.*, 543 F.2d 719 (9th Cir. 1976), the court of appeals declined to apply the *Federal-Mogul* holding in a case in which the fringe group performed work that was "functionally similar" to that performed by employees in the preexisting unit. The Board, however, has continued to apply the doctrine even when both groups of employees perform the same type of work. *Bay Medical Center,* 239 NLRB 731 (1978) ("Mercy Division" LPNs did not automatically come under contract of "General Division" LPNS following *Armour-Globe* election).

quo would promote industrial unrest, our experience and judgment leads us to conclude that it is more likely to prompt both parties to negotiate an agreement expeditiously. Thus, each will be motivated to reach agreement to forestall the continued application of the contract that each party views as the less desirable one. As to the Respondent's contention that the Union faces a conflict of interest where different portions of a unit enjoy different wages and benefits even temporarily, we find this situation at least comparable to the dual-tier bargaining structures which have been routinely advanced as employer proposals in numerous industries and have frequently thereafter been agreed to and administered by unions without disqualifying conflicts of interest. There may be circumstances in which there is practical justification for not requiring an employer to adhere to two different sets of employment terms and conditions covering, respectively, two different groups of employees newly joined in a single unit, until the employer negotiates a new single contract for the unit. We find, however, that the Respondent has presented no justification here for unilaterally terminating the Meadow Gold employees' terms and conditions before bargaining for a new agreement.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of employment of Meadow Gold employees transferred to the Farmer Jack facility and compensating them at Farmer Jack contract rates. Correspondingly, we find that those former employees of the Meadow Gold plant, who declined employment at Farmer Jack and retired because of those changes, were constructively discharged. Those employees, facing the prospect of reduced pensions through lower employer pension-benefit contributions and loss of seniority working under the Borman's Farmer Jack agreement, were offered a Hobson's choice between continued employment by the Respondent or abandonment of rights guaranteed them under the

Act.[11] We agree with the General Counsel that the issue of these constructive discharges was fully and fairly litigated and find that they violated Section 8(a)(3) and (1) of the Act.[12]

The Remedy

Having found that the Respondent engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make employees whole for losses they suffered as a result of the Respondent's failure to apply terms and conditions of the contract in effect at the Meadow Gold plant for the term May 1, 1987, to November 1, 1990. The loss of wages shall be computed as in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall remit all payments owed to the employee benefit funds and reimburse their employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the Respondent's failure to make these payments. Any amounts that the Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). Nothing in our Order, however, should be construed as requiring the Respondent to cancel any wage increase without a request from the Union. See *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

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11. See *Superior Sprinkler*, 227 NLRB 204, 210 (1976).

12. We leave to compliance the determination of the number and identity of former Meadow Gold employees who took early retirement rather than accept employment under unlawfully changed conditions at the Farmer Jack plant.

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Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by constructively discharging employees who accepted early retirement from its Meadow Gold facility, rather than be transferred to its Farmer Jack facility, we shall order the Respondent to offer them positions at the Farmer Jack plant and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) plus interest as computed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set out in full below, and orders that the Respondent, Borden, Inc., Salt Lake City, Utah, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Offering employees increased benefits if they abandon union representation.

(b) Dealing directly with employees concerning terms and conditions of employment of unit employees, thereby undermining the role of the Union as the exclusive representative of unit employees for the purpose of collective bargaining.

(c) Failing to bargain in good faith with Teamsters Local 222, AFL—CIO as the exclusive representative of employees in the following unit:

All employees of Respondent as described in

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Supplements to the May 1, 1987 through November 1, 1990 collective bargaining agreement between Respondent and Central and Southern Conference of Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters and all employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992, employed at Respondent's Farmer Jack facility.

(d) Unilaterally altering the status quo of unit employees transferred between plants.

(e) Terminating employees or otherwise discriminating with regard to their wages and terms and conditions of employment because of their union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the Meadow Gold plant employees who accepted early retirement, rather than work under the terms and conditions of employment of the Borman's Farmer Jack collective-bargaining agreement, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, at the Farmer Jack plant, without prejudice to their

seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired after the transfer of operations from the Meadow Gold plant. If there are not a sufficient number of jobs for all the employees to be offered reinstatement, the Respondent shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable time to accept such offers

(b) Make the Meadow Gold transferees and early retirees whole for any loss of earnings and other benefits suffered in the manner set forth in the remedy section of this decision.

(c) On request of the Union, rescind any departures from terms and conditions of employment affecting former Meadow Gold employees that existed immediately before the Respondent's transfer of operations to the Farmer Jack plant, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans.

(d) Recognize and bargain in good faith with the Union as the exclusive representative of the employees in the unit set forth above.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Meadow Gold and Farmer Jack plants and mail to the last known address of all former employees of the Meadow

Appendix B

Gold plant in the appropriate bargaining unit represented by Local 222, International Brotherhood of Teamsters, AFL—CIO, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted and mailed by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 1991

James M. Stephens,	Chairman
Dennis M. Devaney,	Member
John N. Raudabaugh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

13. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this Notice.

WE WILL NOT promise, directly or implicitly, improved terms and conditions of employment if employees abandon Local 222, International Brotherhood of Teamsters, AFL—CIO as their representative for collective bargaining.

WE WILL NOT bypass the Union and deal with employees directly concerning terms and conditions of employment or other matters properly the responsibility of the Union.

WE WILL NOT make misstatements or mischaracterizations regarding negotiations or the consequences of agreements or disagreements with the Union. More specifically WE WILL NOT tell employees that unless the Union accepts our last offer regarding employee transfers to the Farmer Jack facility, we will be forced to deny employees transfers and will further be forced to lay off employees at the Meadow Gold plant and hire new employees "off the street" at the Farmer Jack facility.

WE WILL NOT unilaterally alter terms and conditions of employment of unit employees transferred between plants.

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WE WILL NOT terminate employees or otherwise discriminate against them with regard to their wages and terms and conditions of employment because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL recognize and bargain in good faith with the Union as the exclusive representative of our employees in the following unit which resulted from the merger of the represented units at the Meadow Gold and Farmer Jack facilities.

> All employees of Respondent as described in Supplements to the May 1, 1987 through November 1, 1990 collective bargaining agreement between Respondent and Central Southern Conference Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters and all employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992, employed at Respondent's Farmer Jack facility.

WE WILL offer Meadow Gold plant employees who accepted early retirement, rather than elect to work under the terms and conditions of employment of the Bonman's Farmer Jack collective-bargaining agreement, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, at the Farmer Jack plant,

without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any persons hired after the transfer of operations from the Meadow Gold plant. If there is an insufficient number of jobs for all the employees to be offered reinstatement, WE WILL place the names of those for whom jobs are not available on a preferential hiring list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired.

WE WILL make Meadow Gold plant transferees and early retirees whole for any loss of earnings and other benefits they have suffered.

BORDEN, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 600 17th Street, Third Floor, S. Tower, Denver, Colorado 80202-5433, Telephone 303—844—3554.

APPENDIX C — DECISION OF ADMINISTRATIVE LAW JUDGE CLIFFORD H. ANDERSON DATED JANUARY 24, 1990

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Cases 27-CA-10412
27-CA-10412-2
27-CA-10412-3

BORDEN, INC.

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 222, AFL-CIO

William J. Daly, Atty., of Denver, CO
for the General Counsel
William F. Schoberlein, Atty., of
Sherman and Howard of Denver, CO and
Keith King, Atty., Corporate Labor Counsel,
of Columbus, OH for Respondent
Stephen W. Cook and Reid Davis, Attys.,
of *Cook and Wilde* of Midvale, UT

DECISION

Statement of the Case

CLIFFORD H. ANDERSON, Administrative Law Judge: I

heard the above captioned case in trial at Salt Lake City, Utah on September 13, 14 and 15, 1989. Post hearing briefs were filed on November 13, 1989. The matter arose as follows.

On February 26, 1988, Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222, AFL-CIO (the Charging Party or the Union) filed a charge against Borden, Inc. (Respondent) docketed as Case 27-CA-10412. On March 11, 1988, the Union filed a second charge against Respondent docketed as Case 27-CA-10412-2 and on April 7, 1988, a third charge docketed as Case 27-CA-10412-3. Following an investigation, on June 15, 1989, the Regional Director for Region 27 of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing concerning the three cases.

The complaint alleges and the answer admits that Respondent acquired two dairy plants in Salt Lake City, Utah — the Meadow Gold facility and the Farmer Jack facility, ultimately closing the Meadow Gold facility and merging operations into the Farmer Jack facility. The complaint further alleges and the answer admits that the Union represented certain employees at each plant during relevant times.

The complaint alleges and the answer denies that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by telling employees at the Meadow Gold facility that they could not be transferred to the Farmer Jack facility unless the Union accepted Respondent's contract proposals. The complaint further alleges and the answer denies that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Meadow Gold employees and rehiring certain of these employees as new hires at the Farmer Jack facility. Finally, the complaint alleges and the answer denies that Respondent violated Section 8(a)(5) and (1) of

the Act by failing and refusing to bargain collectively with the Union by the following acts and conduct: (1) by unilaterally implementing the predecessor's collective bargaining agreement at the Farmer Jack facility in and after November 1987, (2) by unilaterally changing the terms and conditions of Meadow Gold employees by applying the Farmer Jack terms and conditions of employment to Meadow Gold employees employed at the Farmer Jack facility and (3) by bypassing the Union and dealing directly with Meadow Gold clerical employees by offering them improved wages and benefits if they agreed to work without union representation at the Farmer Jack facility.

Findings of Fact

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally and to file post-hearing briefs.

Upon the entire record herein, including helpful briefs from all parties, and from my observation of the witnesses and their demeanor, I make the following findings of fact.[1]

I. Jurisdiction

At all times material Respondent, a corporation with an office and place of business in Salt Lake City, Utah, has been engaged in the production and wholesale sale of milk products. Respondent in

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1. As a result of the pleadings, the stipulations of counsel at trial and the submission of a substantial number of joint exhibits, there were few disputes of fact concerning events. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible testamentary and documentary evidence.

the course and conduct of its business operations in Utah annually sells and ships as well as purchases and delivers goods and services valued in excess of $50,000 directly to and from locations outside the State of Utah. The complaint alleges, the answer admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

The Union is and at all times material, has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

Corporate America has been experiencing a restructuring resulting from the acquisition of, subsequent reorganization and in some cases dismemberment of corporations through mergers, acquisitions, sales and divestures. The instant case involves the consequences of this process in the dairy industry in the State of Utah. A brief history of the industry in Utah and the two facilities involved herein is appropriate.

1. The Milk Production and Distribution Process in Utah

Until the events described herein, three entities produced and distributed the bulk of dairy products in the State of Utah: Safeway Stores, Inc., Beatrice Foods, Inc. and Western General Dairies, Inc. The production employees of each entity were represented by the Union. Respondent, a national corporation principally engaged in the processing, preparation and sale of food and other consumer products, was not a factor in the Utah dairy industry.

Appendix C

2. History of the Meadow Gold Facility

The Meadow Gold facility is a dairy products processing and distribution facility located in Salt Lake City, Utah. Until 1986, the Meadow Gold facility was owned and operated by Beatrice Companies, Inc. (Beatrice) as one of many facilities in its Meadow Gold Dairy Division. The facility's employees were represented by the Union and were covered by: (1) a master agreement covering various Meadow Gold Dairy Division facilities nationwide between Beatrice and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the International) and, (2) by regional and sub-regional contract addenda covering smaller geographical areas negotiated by the employer and various sub organizational units of the International including the Union.

In 1986, Beatrice was acquired by investors in a leveraged buyout through the offices of the firm of Kohlberg, Kravis and Roberts and certain of Beatrice's assets and divisions were put up for sale. Respondent contemplated the purchase of Beatrice's Meadow Gold Dairy Division but determined that its collective bargaining structure was unsatisfactory. Respondent met with the International and entered into an interim labor agreement on October 9, 1986, which was to replace the Beatrice master contract. The parties further agreed that new local addenda would be negotiated as existing local agreements expired with a pattern agreement to be negotiated at the first opportunity.

Respondent thereafter acquired the Meadow Gold Division including the Meadow Gold facility. At the time of acquisition Beatrice was negotiating the State of Utah addendum to the former master contract with the Union. The Meadow Gold facility was covered by the agreement. Respondent took over the negotiations

and, after an initial rejection by employees, an agreement was reached and ratified by the membership in May 1987.[2] The contract covers the period May 1, 1987 through November 1, 1990.

3. History of the Farmer Jack Facility

In late 1986, Safeway Stores, Inc. was also acquired by investors in a leveraged buyout with the assistance of Kohlberg, Kravis and Roberts and certain of its assets put up for sale. The International and its locals represented various Safeway employees nationwide and were signatory to various collective bargaining agreements. The experience of the International on at least one occasion prior to the events in question herein was that, if the unions representing Safeway employees resisted granting substantial contractual concessions to potential purchasers, Safeway's operations were not necessarily purchased and operated in divisional units, but were rather either simply closed down or sold on a piecemeal basis with a concomitant loss of represented employees' jobs.

Saveway's Utah Division — including plants, retail outlets, distribution center, warehousing and trucking operations were for sale and, if not sold as an operating unit, were, in the International's view, at risk of closure. In this setting, Borman's Acquisition Corporation (Borman) approached the International and told them that Borman was considering the purchase and continued operation of the Utah Division as a unit but that substantial contractual concessions from the representing labor unions would be necessary to make the purchase practicable. Very substantial

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2. The contract had not been signed as of the time of the hearing in the instant case. There was no dispute, however, respecting the terms of the agreement relevant herein.

monetary concessions exceeding $2,000 per worker year were obtained by Borman from the Union in a new five year agreement entered into on April 10, 1987 and expiring on April 30, 1992. Thereafter, Borman acquired and operated the Utah Division facilities including the Farmer Jack facility in Salt Lake City, Utah.

Borman began to experience financial difficulties and considered the sale of its Farmer Jack plant. In July, 1987, Respondent contemplated the acquisition of the Farmer Jack facility, an equivalent but more modern plant than its Meadow Gold facility which would better allow expansion. Such an acquisition would allow eventual consolidation of the Meadow Gold and Farmer Jack operations at the Farmer Jack facility. In late September, 1987, Respondent and Borman signed a letter of intent respecting Respondent's purchase of the Farmer Jack facility.

At a meeting held on October 12, 1987, between representatives of Respondent, Borman and the Union, Respondent notified the Union of its intent to acquire the Farmer Jack plant and to assume its collective bargaining agreement. Respondent further indicated that, at least for period, the Farmer Jack and Meadow Gold plants would operate independently, but would ultimately be consolidated at the Farmer Jack facility.

Union representatives took the position that, if the facilities were run independently, their contracts could be separate. If, however, the plants were to be consolidated, the Meadow Gold contract — which was superior from the labor organization's perspective — should apply. Borman's representative expressed concern that such an arrangement could cause problems under the purchase agreement between Respondent and Borman.[3] The

3. The purchased agreement provided for the long term sale of dairy products (Cont'd)

possibility and difficulties of maintaining dual wage and benefit rates at the consolidated facility were also discussed without agreement. The meeting ended with the parties agreeing that they were at a purely exploratory stage and that Respondent would submit a proposal to the Union.

On November 6, 1987, Respondent formally acquired the Farmer Jack plant. On November 7, 1987, it began operations retaining all Borman employees and recognizing the Union as representative of unit employees.[4] At all times material herein, Respondent has applied the terms of the April 10, 1987, Borman agreement to the Farmer Jack facility employees including the granting of scheduled increases in wages, pension contributions and other benefits which fell due under terms of the contract after November 6, 1987. The pension trusts, however, are not accepting the increased payments tendered by Respondent.

B. *Initial Negotiations following Acquisition of the Farmer Jack Plant*

(Cont'd)
by Respondent to Borman's Salt Lake Division retail facilities from the Farmer Jack plant. Product prices were established in accordance with a formula which included, inter alia, labor costs at the Farmer Jack plant.

4. The pleadings establish the following unit as appropriate for bargaining under Section 9 of the Act and as the relevant Farmer Jack unit at least until the time of the merger:

> All employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992.

Appendix C

On November 10, 1987, Respondent's Corporate Director of Labor Relations, Jack McInerney, and Assistant Director of Labor Relations, Neil Finnerty, met with representatives of both the Union and the International. Respondent's representatives confirmed its acquisition and operation of the Farmer Jack facility, its retention of Borman Farmer Jack unit employees, its recognition of the Union, its intention to assume and apply the Borman contract and its intention to consolidate the Meadow Gold and Farmer Jack operations at the Farmer Jack facility, Respondent also expressed a willingness to negotiate respecting the effects of the closure of the Meadow Gold plant. No agreement of any kind was reached at this meeting.

On November 12, 1987, the Union sent Respondent's representatives a letter with the following language:

> The purpose of this letter is to request an immediate meeting to negotiate the wages, hours, and working conditions of all employees (all Farmer Jack and Meadow Gold) affected by this sale. Further, this letter is to request that the present Farmer Jack Labor Agreement not be unilaterally altered by your company pending completion of these negotiations.

Respondent and the Union held negotiations respecting the two plants on January 5, and 6, 1988. At these meetings, Respondent announced that the consolidation of the two plants at the Farmer Jack facility and the closure of the Meadow Gold facility were to take place by July 1988. Respondent's position respecting the Farmer Jack unit was that, when Respondent had acquired the plant, it had also "purchased the contract." Discussion

of provisions for the transfer of Meadow Gold unit employees to the Farmer Jack facility and the dove tailing of the seniority of employees in the two units took place.

The Union submitted a written proposal at the end of these negotiations which included in its provisions the proposed freezing or "red circling" of Meadow Gold employee contract wage rates as of the time of their transfer and the incorporation within the Farmer Jack contract of these red circled rates for the transferred Meadow Gold unit employees.[5] This proposal was not acceptable to Respondent and negotiations ended with an agreement to meet on January 13, 1988.

At the January 13, 1988 negotiations, Respondent proposed to accept the Union's proposals respecting dovetailing of seniority and transfer of Meadow Gold employees to the Farmer Jack plant and further proposed increased transfer and severance payments to Meadow Gold employees. Respondent, however, specifically rejected the Union's proposal to carry Meadow Gold wage rates along with Meadow Gold employees to the Farmer Jack plant even if only in the form of red circled rates. Respondent indicated it was determined to preserve the wage structure at the Farmer Jack Plant. Agreement was not reached. At no time thereafter did the Union submit Respondent's offer to employees for consideration.

On January 27, 1988, Respondent announced to employees its

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5. The Borman Farmer Jack rates, which were being followed by Respondent, were significantly lower than the Meadow Gold rates. Thus, if the Union's proposal had been implemented, the Meadow Gold transferees would enjoy higher, if frozen, wage rates than the original Farmer Jack employees until the scheduled increases under the Farmer Jack contract raised the Farmer Jack wages to the level of the Meadows Gold transferees.

intention to consolidate the facilities at the Farmer Jack facility. An employee grievance was filed thereafter challenging the action. Thereafter, in February and March, meetings were held with unit employees in which the move and its consequences were discussed, see separate discussion infra.

On March 29, 1988, the parties met again. The Union submitted a new proposal which would freeze Meadow Gold wage rates and accelerate Farmer Jack rates so that they reached a common level at the contract expiration date in 1992. Respondent did not accept the proposal retaining its position that the Borman contract rates would control at the Farmer Jack facility, with transfer and severance payments being paid to Meadow Gold employees without modification of the Farmer Jack wage structure. Respondent proposed increases in Meadow Gold employee transfer payments without Union acceptance.

The parties met again in May and October 1988, and in the period immediately before the trial herein. No agreement has been reached on the issues concerning Meadow Gold employees or on a contract covering the Farmer Jack facility. To the time of the hearing employees at the Farmer Jack plant[6] were compensated at the rates provided under the Borman Farmer Jack contract.

C. *Respondent's Meetings with Employees*

In February 1989, Respondent held two meetings with Meadow Gold unit office employees in the office of the controller, Robert Lake. Respondent's then General Manager, Anthony Ward, discussed the specifics and timing of the upcoming consolidation

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6. Not including driver sales employees who were still covered by the Meadow Gold Contract.

and its consequences. Employees Catherine Joan Cherti and Wildea McDonald and General Manager Ward testified concerning the meetings.

There is no dispute that after the announcement of the move, discussion was held, questions were posed by employees and answered by management. The fact that the Meadow Gold clerical staff was part of the represented Meadow Gold bargaining unit and the fact that the Farmer Jack clerical employees were not part of the represented Farmer Jack bargaining unit and the implications of those facts were discussed. Mr. Ward told employees that when they moved they would not be covered by the Union contract. Terms and conditions of employment of clerical employees at the two facilities was discussed. Mr. Ward testified:

> As I recall, I expressed my personal opinion that I don't feel the Union plays a constructive part in an office. And I felt that there would be more flexibility for the Company, more flexibility for the employees without a union office. And I expressed the feeling that a person may get or be rewarded more, based on their abilities, without a union office; or, again, it may be different. Union versus non-union, more flexibility, both ways, benefits for the Company, benefits for the employees. That was my personal opinion . . . I said a person could get higher benefits — higher pay. I didn't say a person or they will get higher pay. I said there's the flexibilities [sic] for reward more for performance.

Ms. Cherti testified that Ward

> said as far as the office was concerned the Company didn't believe in office being union. He himself didn't believe in a union office. And if we didn't have a union office that we would have more benefits, we would get more raises, the promotions would be better, and each one would be able to earn on their own merits rather than what the Union contract said that we would get.

Ms. McDonald generally corroborated the other's testimony. She described Ward's statements about wages as follows:

> Mr. Ward himself did not see any need for a union, that we could have better pay — or not necessarily better pay, but — how was it he put it? — that we would receive more pay for our work if we did good work, you know, additional, like merit raises type. And where it is now with the union contract you have to wait until such and such date for your 25-cent or 50-cent, whatever the raise happens to be. And then you would also be advanced according to your work, you[r] skills and your interest in working, you know, showing that you are doing well.

Respondent's January 1988 offer to the Union provided, inter alia, for the transfer of Meadow Gold employees to the Farmer Jack facility upon closure and the dovetailing of those employees' seniority with Farmer Jack employees. As noted supra, the Union did not accept the proposal nor did the Union submit the proposal to the unit employees for consideration. On February 29, 1989, the

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Union filed Case 27-CA-10412. A regular Union membership meeting was scheduled for the evening of March 10, 1988. In this context, on March 9 and 10, 1989, Respondent convened two meetings of Meadow Gold unit employees.

The parties stipulated that at these meetings Respondent's representatives explained that they were not seeking to bargain with the employees. They explained Respondent's outstanding January 13, 1988 proposal and urged the employees to seek a vote on the proposal. They told the employees that the Union had informed Respondent that it did not accept the proposal and did not intend to submit it to the membership. Respondent's representatives told the employees that the proposal was Respondent's final proposal and, if agreement could not be reached with the Union on the proposal, Respondent would have "no choice but to layoff the employees at Meadow Gold, and hire from the street" at Farmer Jack. The parties further stipulated that employees learned at the meetings that, if the proposal was not ratified, or was not voted upon, then the employees would not be transferred, and they would have to apply as new employees at the Farmer Jack operation.

Also introduced into evidence was a detailed summary of the two meetings prepared by Respondent's agent. That memorandum indicated that Mr. Neil Finnerty, Respondent's Assistant Director of Labor Relations, told the assembled employees, inter alia, that:

> . . . [T]he proposal was still out there, and that the closing [of Meadow Gold] was coming and it would be necessary to hire off the street if some resolution of this problem was not forthcoming in the very, very, near future. [Finnerty] indicated that it would be

> impossible to transfer these individuals or pay them any severance without that being agreed upon by the Union. He further indicated that court battles were long term propositions and that lawyer basically only fought over little words and that it was the people who would lose if they didn't transfer.

The memorandum further indicated that Finnerty, in answer to questions from employes, made the following statement respecting the Farmer Jack contract.

> Remember that under the Farmer Jack contract we are duty bound to honor at that location there are some give backs of both the wages and benefits over the course of time.
>
> * * *
>
> We are honoring the Borman contract at that location and because that was an essential part of the purchase of the Borman facility we need in order to effectuate the bargain period.

In answer to the question "Why don't you honor both contracts?", the memorandum indicates Finnerty responded:

> When we move we can't say both contracts are applicable to the location. We can't give you a job without this particular agreement being ratified [by the Union] and we'll have to hire off the street.

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The circumstances of the Union membership meeting of the evening of March 10, 1988, were not placed in evidence but, apparently, no vote on Respondent's proposal occurred. On March 13, 1988, an employee petition was filed with the International seeking a vote on Respondent's offer based on expressed employee concern for "our welfare and continuance of employment." On March 14, 1988, the Union filed Case 27-CA-10412-2.

D. *The Consolidation of Operations at Farmer Jack and the Closure of Meadow Gold*

The Union's state-wide bargaining unit covered by its Meadow Gold contract with Respondent contained 135 employees just prior to November 7, 1987. The Farmer Jack bargaining unit on November 7, 1987 contained 35 employees. During the initial post-acquisition period, because of the supply agreement negotiated as part of the purchase of the Farmer Jack facility, each facility operated much as before before supplying its existing customer base. In early 1988, however, Borman sold the remaining portions of its Salt Lake Division and the Farmer Jack plant lost a significant portion of its sales volume. This loss of volume made it impractical to operate both the Farmer Jack and the Meadow Gold facilities and a decision was taken in March, 1988 by Respondent to accelerate the consolidation of the two facilities.

By March the move had been announced to employees and new supervisory appointments were made for the merging enterprises — in some cases placing one person in charge of a given position at both facilities. Equipment was moved from the Meadow Gold plant to the Farmer Jack plant over the period May to October 1988, in such a manner that various functions or processes were shut down, transferred and put back in operation independently of other processes. By October 7, 1988, the

consolidation was complete and all production ceased at the Meadow Gold facility. As noted, clericals have remained at the Meadow Gold plant on an interim basis.

Respondent did not formally transfer its Meadow Gold employees to the Farmer Jack facility. Nor were seniority rights honored or any of Respondent's proposals respecting the transfer put into effect. With respect to at least selected employees, however, transfers were in fact made. Meadow Gold employees were solicited to contact a state employment officer as their work at Meadow Gold came to an end. Following a state interview, physical examination and pro forma Farmer Jack application process, the employees resumed employment, now at Farmer Jack, at their same or similar jobs utilizing the same equipment used at the Meadow Gold facility. Virtually no compensated time was lost by the employees transferring in this manner. The employee transfers, as with the equipment, occurred over the period in organizational units as particular parts of the operation at Meadow Gold were stopped, moved to Farmer Jack and then returned to operation. The transferred employees were formally classified and paid as new employees under the terms of the Borman Farmer Jack contract although they were credited with having had outside experience.

As of October 7, 1988, the Farmer Jack unit was comprised of 35 former Meadow Gold unit employees, 31 Borman Farmer Jack employees and 13 employees hired "off the street" since the acquisition from Borman. Nine supervisors — at various levels of supervision — transferred from the Meadow Gold facility to the Farmer Jack facility.[7] Other Meadow Gold production employees

7. Apparently a significant number of supervisory employees returned to their former employer in the period following the acquisition of the Farmer Jack plant allowing for the ready placement of the Meadow Gold supervisory team at Farmer Jack.

took early retirement rather than transfer to the Farmer Jack facility.[8] Respondent continues to apply the Borman contract terms to all production employees at the Farmer Jack facility. Twenty-two clerical employees as of the time of the hearing remained at the Meadow Gold facility on an interim basis and 32 route driver salesmen were transferred to the Farmer Jack facility. These latter two groups of employees are still covered by the terms of the Meadow Gold contract.

E. *Analysis and Conclusions*

The General Counsel's pleadings do not allege broad bad faith bargaining by Respondent with respect to either the Meadow Gold or the Farmer Jack units. Rather the General Counsel has alleged specific, narrow acts and conduct as violative of the Act. Further, the Charging Party contends that the Farmer Jack unit is an accretion to the Meadow Gold unit. In resolving the allegations it is appropriate to deal with the accretion issue first and thereafter to turn to the individual allegations of the General Counsel's complaint.

1. The Accretion Allegation

The Charging Party argues that under either a theory of accretion or relocation, or both, the Farmer Jack unit merged with and became a part of the Meadow Gold multi-facility unit as of the November 1987 date of Farmer Jack's acquisition by Respondent. The Charging Party argues further that the Meadow Gold contract, by virtue of the accretion, applies to all Farmer Jack unit

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8. The lower pension contributions under the Borman contract had the potential effect of reducing the pensions of employees with long service under the high contribution rates of the Meadow Gold contract.

employees. Respondent opposes the Charging Party's arguments. The General Counsel does not directly address the issue.

The Board finds an accretion, the automatic inclusion of one group of employees in an existing bargaining unit without consideration of the sentiments of the accreted group, where two circumstances exist. First, the employees to be included must be a relatively small number of employees compared to the group into which it is being subsumed. Second, the employees to be accreted must lack a sufficiently separate identity to exist independently as an appropriate bargaining unit and must have a sufficient community of interest with the accreting group so as not to render the new combined bargaining unit inappropriate. *Melbet Jewelry Co.*, 180 NLRB 107 (1969), *Safeway Stores,* 256 NLRB 918 (1981). These requirements flow naturally from the Board's preference for allowing employees the opportunity to express their sentiments concerning union representation. Where a unit of employees could under Board representational decisions stand independently of other bargaining units, it is not appropriate to include that potentially independent unit of employees in another bargaining unit without testing employee sentiment. Even where no independent bargaining unit is appropriate under Board standards for the employees to be accreted, an accretion will not be found where the number of new employees is not sufficiently small relative to the number of employees in the existing unit so that the sentiments of the group to be accreted need not be fairly considered in determining the wishes of the overall unit.

An accretion normally occurs as of the creation of the new group of employees at issue. The Charging Party argues the accretion herein occurred as of the acquisition by Respondent of the Farmer Jack facility and retention of Borman's Farmer Jack employees on November 7, 1987. The Farmer Jack employees

were certainly new to Respondent as of that date. The Charging Party argues that as of the time of the acquisition the Farmer Jack unit complement was 35 and the Meadow Gold 135. Thus, argues the Charging Party, the Farmer Jack employees were a relatively small proportion of the Meadow Gold unit.

The Charging Party further contends that the Farmer Jack unit had a close community of interest with the Meadow Gold unit and an insufficient independent community of interest to stand alone as a separate bargaining unit. Respondent argues to the contrary on brief at 33:

> The Farmer Jack plant, which was of course a pre-existing bargaining unit, has little in common with the remaining parts of the Meadow Gold Unit. There is nothing in evidence to support the integration or commonalty of conditions necessary to argue an accretion. The Union is arguing for lumping together operations which ordinarily would be treated separately under bargaining unit rules.

I have considered the evidence and arguments respecting the purported inability of the Farmer Jack unit to stand alone as an appropriate unit for bargaining under Section 9 of the Act. I agree with the Charging Party that the time of testing the appropriateness of the accretion is the date of acquisition. At this time both dairy facilities were in operation and it was foreseen that each would continue in operation at least for a reasonable period. I have also considered the Charging Party's skilled marshalling of evidence regarding the similarity of the work done at the two plants, their physical proximity and their place in Respondent's organizational structure. To the extent the Charging Party relies on developments

caused by or occurring during the consolidation process, I have discounted such evidence as not relevant to the issue of accretion as of the date of the acquisition.

Having considered the arguments of the parties and the record as a whole on the issue, I disagree with the Charging Party and find that the Farmer Jack unit could stand alone as a separate bargaining unit as of the time of the acquisition. I so find primarily because the Farmer Jack unit was not simply a new unit of employees without a history of collective bargaining or a separate identity of its own. While new to Respondent, the Farmer Jack facility was, as noted above, an existing operation which had been owned by two previous entities and was taken over by Respondent as an independent operating facility with all its equipment, supervisory staff, markets and procedures in place and operating. I do not believe that such a long operating entity may be easily held unable to exist independently as a separate bargaining unit. Given this finding, I reject the Charging Party's contention that the Farmer Jack unit was an accretion to the Meadow Gold unit.[9]

The Charging Party also argues the accretion doctrine applies treating the instant case as a consolidation citing *Central Soya Co.*, 281 NLRB 1308 (1986). In that case, however, the Board looked to the consolidated facility, upon completion of the consolidation, to determine if a majority of employees came from the unit at issue. Such an analysis is also necessary here in light of my finding,

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9. The Charging Party does not argue the accretion was effective at the time of the consolidation. Were the Charging Party to have done so, other factors, such as the significant changes in the circumstances of the dairy production employees in the Meadow Gold unit and the differing community of interests inherent in two groups of employees facing a consolidation of bargaining units would have defeated any accretion argument.

supra, that the Farmer Jack unit may stand as a separate appropriate unit. In the instant case the Meadow Gold transferees never constituted a majority of the consolidated Farmer Jack unit. Accordingly, no accretion of the Farmer Jack unit into the Meadow Gold transferee unit under the *Central Soya* line of cases is possible.

The Charging Party also likens the instant case to a relocation citing *Marine Optical, Inc.*, 255 NLRB 1241 (1981), enfd. 671 F.2d 11 (1st Cir. 1982); *Westwood Import Co.*, 251 NLRB 1213 (1980), enfd. 681 F.2d 644 (9th Cir. 1982); and *Harte & Co.*, 278 NLRB 947 (1986). The Board in *Harte*, at 948, set forth the following:

> In relocation cases such as this one, our task is to distinguish situations where the new facility is basically the same operation, simply removed to a new site, from those where the new facility is somehow a different operation from the original. In the former case, a collective bargaining agreement in effect at the old location is logically applied at the new one. In the latter, the old agreement has no place at the new facility. Given the complexity of modern business transactions, the determination of exactly what relationship the new plant bears to the old is not always easy to make. Nonetheless, we have developed standards in our contract-bar and failure-to-bargain cases to determine when there is a sufficient continuity of operations to justify applying an existing agreement to a new location. These cases hold that an existing

> contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if the transferees from the old plant constitute a substantial percentage — approximately 40 per cent or more — of the new plant employee complement.

The difficulty with the Charging Party's argument here is that the Board in *Central Soya Co.*, 281 NLRB 1308 fn. 6, held "exclusively relocation" cases distinguishable from relocations which also, as here, involve consolidations. Given this distinction, I find that the instant case presents the test established in the quoted language immediately above. Applying that test, I find the new arrangements at Farmer Jack are not the same operations but are "somehow different" from either pre-consolidation operation. Accordingly, I find the relocation arguments of the Charging Party are not controlling of the result herein.

2. Complaint Paragraph 12(a); The Assumption of the Borman Farmer Jack Contract

a. *The Positions and Arguments of the Parties*

There is no dispute that Respondent was a successor to Borman at the Farmer Jack facility and under Board doctrine was obligated to recognize the Union and maintain the status quo ante respecting employees' terms and conditions of employment pending agreement with or impasse in bargaining with the Union. There is also no dispute that Respondent had neither a right nor an obligation to assume the predecessor's contract with the Union. Further, it is undisputed that Respondent has, in effect, followed the Borman Farmer Jack contract's terms since its acquisition of

the facility and, rather than simply freezing conditions as of the time of the acquisition, has made changes in employees wages and fringe contributions after the acquisition to the extent these were scheduled in the Borman contract.

The General Counsel and the Charging Party contend that all changes in employee terms and conditions made after the acquisition were unilateral changes violative of Section 8(a)(5) and (1) of the Act and that Respondent has not simply preserved the status quo ante but rather improperly assumed the Borman contract. Respondent asserts three separate defenses. First, Respondent contends its following of the contract was no more than the maintenance of the status quo and that withholding the scheduled contract increases would have been itself a change in existing conditions. Second, to the extent its compliance with the contract is regarded as a change in the status quo, the changes were justified as post impasse last offer implementations. Finally, Respondent asserts that its actions were consistent with the Union's expressed desire that it follow the Borman contract.

The Charging Party argues that the Union's November 12, 1988, request that Respondent not alter the contract did not last forever and was retracted in subsequent bargaining. Thus, the Charging Party asserts that its subsequent contention that the Farmer Jack unit was an accretion to the Meadow Gold unit and was therefore covered by the Meadow Gold contract was inconsistent with and superseded the November 12 request. Respondent argues, however, that the Union in effect took inconsistent positions in bargaining, making accretion claims in its unfair labor practice charges and in the grievance process but not seeking changes in the Farmer Jack agreement for Farmer Jack employees and generally agreeing with the continuation of the predecessor agreement at the bargaining table with respect to those employees.

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The General Counsel and the Charging Party also point out that Respondent during virtually all the negotiations maintained its position that it had "bought the contract" when it acquired the Borman facility. They note further that this same position was taken in Respondent's meeting with employees. This repeated assertion by Respondent's agents, argue the General Counsel and the Charging Party, should be credited and supports their position that the contract was in fact improperly assumed by Respondent.

b. *Analysis and Conclusion*

There is no dispute that Respondent was obligated to maintain the status quo and could not, without the agreement of the Union, assume the Borman contract. There is also no doubt that Respondent has followed the contract's terms. I reject at the outset, the argument of Respondent that the honoring of the contract terms, including all in futuro scheduled changes in wages, pension trust payments and other terms and conditions of employment, was simply maintenance of the status quo. Respondent's cited cases are inapposite for they do not address the assumption of a contract in its entirety, rather they address the different subtler issue of the continuance of a practice of granting wage increases. The changes made in terms and conditions of employment after acquisition were in fact changes in the status quo ante. I also reject Respondent's second claim that the contract changes were justifiable as a post impasse implementation of its last offer. This defense is not viable since Respondent's implementation of the contract was a course of conduct undertaken from the time of its acquisition of the facility and was not initiated after some later argued impasse in bargaining.

That Respondent's conduct was agreed to by the Union or

even done at the Union's request is a more substantial defense. As quoted, in its entirety, supra, the Union's November 12, 1987, letter to Respondent included the following:

> Further, this letter is to request that the present Farmer Jack Labor Agreement not be unilaterally altered by your company pending completion of these negotiations.

The letter asks that Respondent apply the contract without alteration. This request is clearly different from a request — consistent with Respondent's admitted legal obligation — to maintain the status quo. It is also true that Respondent in effect simply took the action requested of it in the letter.

I find that this Union request, whether viewed as an initial request which justifies Respondent's conduct from its initiation or as a subsequent agreement which waives the Union's right to later object, is a valid defense to the General Counsel's allegation that unilateral changes were made when the contract was followed. While the status quo was not in fact maintained by Respondent and therefore changes were made in employees' working conditions, the changes were consistent with the Union's request and were therefore neither unilateral nor violative of the Act.

The Charging Party's contention that the Union request was withdrawn by the Union's subsequent conduct does not fail as a matter of law, but rather as a matter of fact. I agree that the Charging Party could have at anytime withdrawn its request that Respondent follow the terms of Borman's contract and that Respondent would thereafter have made any changes in working conditions at its peril. Such a retraction or withdrawal must in my

view, however, be explicit to thereafter charge Respondent with knowledge that the Union's earlier request had been withdrawn. The Union could have specifically by letter or statement in bargaining withdrawn its earlier request. It never did so. The Union argues its later behavior made its new position clear. I do not believe the Union's overall conduct may be found to have retracted its letter of November 12, 1988. It would require a very strong and consistent course of conduct by the Union to support a finding that this later conduct withdrew the earlier written request that the contact [sic] be followed. Such clarity would be necessary to support a finding that Respondent at some later point in the bargaining process violated the Act by continuing to apply the contract when it should have realized the Union's November 12, 1987 request was withdrawn by circumstances. Such clarity is lacking here.[10]

This finding is not modified by the fact that Respondent in its purchase agreement with Borman, and virtually throughout the course of bargaining and in meetings with employees, asserted the Borman contract had been "bought" with the facility and was in effect assumable as a matter of right by Respondent. This evidence supports a finding that Respondent was in fact acting as if the contract had been assumed, but this is not inconsistent with my findings above. Evidence of Respondent's assertions, assumptions or even motives does not address the issue of whether the conduct of Respondent was rendered not improper by the Union's request

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10. The Union's February 1988 charge alleges unilateral changes at the Farmer Jack facility without greater specificity. The charge is not in and of itself a retraction of the letter of November 12, 1987. Nor does the fact that at some point the pension trusts no longer accepted pension contributions from Respondent convince me otherwise. It was up to the Union, in light of its clear request of November 12, 1987, to explicitly retract that request.

of November 12, 1987.[11] I have found changes were made. I have also found they were not unilateral because of the Union's request. Respondent's conduct is not relevant to this critical aspect of the case. Accordingly, based on all the above and the record as a whole, I find the General Counsel's allegation is not sustained by the evidence and I shall dismiss paragraph 12(a) of the complaint.

3. Complaint Paragraph 12(b): The Unilateral Implementation of Farmer Jack Terms and Conditions on Meadow Gold Employees Working at Farmer Jack

There is no dispute that production employees from the Meadow Gold unit came to work at the Farmer Jack facility and that Respondent applied the terms and conditions of the Farmer Jack unit to them. Respondent contends that these transfers occurred simply as a result of the layoff of Meadow Gold unit employees and the subsequent and legally independent act of hiring those same individuals as Farmer Jack unit new hires. I find, based on the facts set forth, supra, that the moves were rather Respondent initiated transfers of employees, who, in effect, transferred along with their equipment and their work to the Farmer Jack facility as part of the consolidation of the Meadow Gold and Farmer Jack operations.

The General Counsel agrees with Respondent that the Meadow Gold and Farmer Jack units were separated until the time of employee transfers from Meadow Gold to Farmer Jack. Respondent contends that now consolidated Farmer Jack unit remains conceptually unchanged and legally unaffected by the Meadow Gold closure and transfer of employees. The General

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11. In determining whether changes in working conditions violate Section 8(a)(5) and (1) of the Act, the employer's subjective good or bad faith is not relevant, *NLRB v. Katz*, 369 U.S. 736 (1962)

Appendix C

Counsel argues that the substantial number or Meadow Gold transferees, both unit and supervisory, as well as the increased market for product at the Farmer Jack plant resulting from the Meadow Gold-Farmer Jack consolidation created a new and different third unit from the combination of the two older Meadow Gold and Farmer Jack units citing *Martin Marietta Co.*, 270 NLRB 821 (1984).

I agree with the General Counsel that the separate units of dairy production employees became a single unit, different from the two earlier units at some point in the consolidation. The General Counsel is not contending that either the Meadow Gold contract or the Farmer Jack contract under Borman applies to the new unit. There is no dispute that the Union represented the two former units and represents the current unit howsoever characterized. Accordingly, the question arises as to what possible consequence is the question of whether the current unit is the old Farmer Jack unit simply continuing on or a new unit resulting from a consolidation of the two older units?

The General Counsel's argument in support of a violation of paragraph 12(b) of the complaint is a novel one based on an interesting and apparently unprecedented analysis respecting the requirement of preservation of a bifurcated status quo ante in consolidated unit cases. The General Counsel contends that the fact that a new unit was created by the consolidation of the two previous units, as opposed to the unaltered continuation of the Farmer Jack unit at the Farmer Jack facility and the simple elimination of the Meadow Gold unit, means that the Respondent was required to preserve the separate status quo ante of each portion of the new unit.[12] The General Counsel argues that since the

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12. This theory may perhaps be characterized as one requiring the preservation of the status quo ante of origin.

new unit is a consolidation of two other units, the terms of employment applicable to each unit at the time of consolidation must be continued as would be the status quo ante in other more traditional situations. Thus, the "old" Farmer Jack unit employees and, presumably new "off the street" hires, should receive old Farmer Jack terms and conditions of employment and Meadow Gold unit transferees should receive their old Meadow Gold terms and conditions. If the General Counsel's theory is correct respecting Respondent's obligation to maintain the status quo ante of origin for Meadow Gold unit transferees, argues the General Counsel, then Respondent unilaterally changed Meadow Gold unit transferees' conditions of employment when it applied the Farmer Jack terms and conditions to them and, in so doing, violated section 8(a)(5) and (1) of the Act.[13]

Respondent argues on brief that the General Counsel's theory in this regard is simply without binding precedent[14] and produces the anomalous result of a single unit represented by a single union in which there are two classes of employees each receiving completely different terms and conditions of employment. The General Counsel seeks to meet Respondent's arguments on brief at pp. 29-30:

> The parties should negotiate a new contract for

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13. There would be additional important implications. For example, if the transferees should have been offered their previous terms and conditions of employment, might not all those Meadow Gold unit employees who choose not to transfer to Farmer Jack because of the lower wages and benefits be constructive discharges under traditional Board law?

14. The parties disputed the applicability of a decision of an administrative law judge adopted by the Board in the absence of exceptions to the case at hand. The parties agree, however, that the decision is not binding precedent.

> the merged unit. And while the parties bargain, it is also reasonable that Respondent maintain the pre-existing terms and conditions of employment of the employees. It was not the employees' decision to close the Meadow Gold plant and merge the operations. It was Respondent's decision. The employees should not be required to suffer different wages and terms and conditions of employment while the parties fulfill their statutory obligation to bargain in good faith. It is anticipated that the Respondent will argue that this result will require it to have employees in the same plant working under different terms and conditions of employment. However, this is not a situation designed to go on in perpetuity. These conditions would be maintained only while the parties bargain in good faith to agreement or impasse. Moreover, two-tier wage scales are not a concept foreign to labor relations. Nor are merit wage systems which result in employees working side-by-side but receiving different compensation. Respondent itself is not unfamiliar with situations where employees work under different, but simultaneous pension contribution rates [transcript citation omitted]. Thus, this is no justification for Respondent's avoidance of its statutory obligation to maintain pre-existing terms and conditions of employment.

I admit to being well taken with the General Counsel's theory and analysis. As noted, supra, in the analysis of the Charging

Party's relocation arguments, see e.g. *Harte & Co.*, 278 NLRB 947 (1986), if 40 per cent or more of a new unit comes from an originating location, the old contract will be applied to the new unit. Consolidation cases, see e.g. *Central Soya Co.*, 281 NLRB 1308 (1986), require majority transfer. Where two separate units of the same employer represented by the same union each contribute substantial proportions of the employes in a new unit, why should the employer not be obligated to preserve the status quo as to each group within the new unit until an agreement with the Union or an impasse in bargaining is reached?

I shall not, however, sustain the General Counsel's argument here. Howsoever a new argument or construction of law may appeal to an administrative law judge, it is the Board and courts which must fashion new law. What the General Counsel advances here is not mere judicial interpolation within the developing web of the law. The General Counsel seeks in my view the extrapolation of current bargaining unit doctrine to produce a new conceptual and definitional analysis which in turn creates new obligations on the parties in bargaining. The General Counsel seeks, through analysis however able and compelling, to expand the obligations of Section 8(a)(5) and (1) of the Act. The General Counsel must go to the Board, in my judgement, with such arguments for it is the Board and not its administrative law judges who is charged with the duty to interpret the Act and, as appropriate, expand its reach.

Having rejected the General Counsel's argument for obligating Respondent to maintain the status quo of Meadow Gold unit employees transferred to Farmer Jack positions, I find there was no obligation on Respondent to maintain Meadow Gold conditions for Meadow Gold production employees at the Farmer Jack plant. Accordingly, Respondent did not improperly change Meadow Gold employees' terms and conditions of employment

when it transferred those employees to the Farmer Jack plant and compensated that at Farmer Jack rates. The General Counsel has therefore failed to sustain his burden of proof with respect to this allegation and I shall dismiss paragraph 12(b) of the complaint.

4. Complaint paragraph 12(c): The Statements of General Manager Ward in February 1988 to Meadow Gold employees

There was little dispute concerning Mr. Ward's statements to employees as described above. Unless specifically noted, to the extent differences exist, I credit the two employees where they corroborate one another or Mr. Ward, but do not credit either employee witness where not so corroborated. It is clear that Ward's remarks were made to clerical employees in the controller's office — a locus of managerial authority — at a time when the clerical employees were contemplating the possible loss of union representation and the further loss of existing contract terms and conditions of employment. In such a setting the fact that the General Manager's statements were labeled as his personal opinion does not shelter them from scrutiny nor ameliorate otherwise violative statements.

To the extent that Ward simply compared and contrasted the leveling and standardizing effect of the existing union contract's wages and benefits with a hypothetical flexible, merit based compensation system which would exist without union representation, Ward was not violating the Act. The General Counsel contends, however, that Ward promised employees "that Respondent would reward them with better wages and benefits if they were not represented by the Union after their move to the Farmer Jack Plant." (The General Counsel's brief at 16.) Such conduct, the General Counsel correctly notes, interferes with employees' Section 7 rights, thereby violating Section 8(a)(5) and

(1) of the Act, and constitutes an attempt to directly deal with employees respecting matters properly the province of the Union thereby violating Section 8(a)(5) and (1) of the Act. *Bay Area-Los Angeles Express, Inc.*, 275 NLRB 1063 (1985).

The issue in this aspect of the case then is one of fact. Indeed, the question is close. Clearly, if Ms. Cherti's version of events is credited, the General Counsel's burden of proof is sustained and a violation should be found. This is so because her version of Ward's remarks attributes to him direct promises of increased wages and benefits conditional only on the employees abandoning their union representation. Ms. McDonald, however, tended to corroborate Ward's testimony that he dealt with wage increases, only in the sense that rates without a Union would be merit based rather than standardized and that some individuals could obtain increased wages under such a system.

Having considered the testimony of the three witnesses on the meeting and the record as a whole concerning its context and circumstances, I find that Ward went beyond the area of permissible employer statements and made impermissible promises of improved benefits to employees, if the Union and the contract were abandoned. I so find primarily based on the uncontested fact that Ward told the employees "a person could get higher benefits", absent union representation. While it may be fairly argued that Ward's statements about improved wages were merely a benign description of a different distribution of wages among employees of varying degrees of merit, such a defense does not reasonably lie as to promises of increased benefits. Employees could reasonably have been expected to conclude — as its customary in the United States and was apparently true respecting Respondent's existing benefit system — that all employees, irrespective of merit, receive equal fringe benefits and, therefore,

all employees would receive benefit increases if the Union were abandoned. Such a promise, given the increasing importance of non-wage benefits in employee compensation plans is neither subtle nor elusive nor deminimus. Indeed, the promise of an equal or superior health and welfare plan, if they would reject the union, by the employer to employees was one aspect of employer conduct violative of the Act in *Bay Area-Los Angeles, Express, Inc.*, supra.

Given all the above, I sustain paragraph 12(c) of the complaint. More particularly, I find that Respondent, through Ward in February 1988, violated Section 8(a)(5) and Section 8(a)(1) and independently violated Section 8(a)(1) of the Act, by promising employees increased benefits if they abandoned the Union as described above.

5. Complaint paragraphs 5 and 6: The Statements of Assistant Labor Relations Director Finnerty to Employees in March 1988 that Transfers Could Not be Granted Absent Union Agreement and the Withholding of Farmer Jack Transfers to Meadow Gold Employees.

Respondent announced at meetings with Meadow Gold employees that unless the Union agreed with its last proposal, Meadow Gold employees would not be able to transfer to the Farmer Jack unit, but would rather be laid off when their positions were abolished at Meadow Gold. Thereafter Respondent in fact refused to transfer employees in any formal sense. The meetings and the refusal to transfer employees were challenged by the General Counsel. Since the propriety of the refusal to transfer employees is relevant to the propriety of the earlier statements concerning it, the transfer issue is addressed initially below.

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a. *Complaint Paragraph 6: The Layoffs and Transfers*

As described above, when Respondent and the Union failed to reach agreement on terms and conditions of employment respecting the closure of the Meadow Gold production unit and the consolidation at the Farmer Jack facility, Respondent did not implement its final offer but rather simply laid off employees in the Meadow Gold unit when their work was concluded at the Meadow Gold facility. The exception to this process was that a significant number, although not necessarily all Meadow Gold production employees, were given the opportunity to transfer to the Farmer Jack unit by following the procedures described, supra. I have found the layoff and rehire procedures were tantamount to a transfer of employees. I reject any contrary characterization by Respondent. These transfers were treated as new hires at the Farmer Jack facility with respect to their terms and conditions of employment. The terms of Respondent's last offer were not applied to them. The transferees received no transfer payments, carried no seniority and received no credit for Meadow Gold service in establishing their Farmer Jack wages — save in that they were considered to have non-unit experience in the industry. In this sense, they were denied specific benefits of transfer which they would have received if Respondent's last offer had been implemented.

The General Counsel alleges Respondent's failure to transfer the Meadow Gold employees, consistent with its last offer to the Union, is a violation of Section 8(a)(3) and (1) of the Act. The General Counsel concedes on brief that Respondent "was neither contractually nor statutorily obligated to transfer the Meadow Gold employees to the Farmer Jack plant." The thrust of the General Counsel's argument is that Respondent's conduct herein was part of an illegal course of conduct designed to coerce the

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Union into consenting to Respondent's wrongful assumption of the Borman Farmer Jack contract. When the Union would not agree, argues the General Counsel on brief at 21:

> [Respondent] attempted to force the Union to grant this consent by threatening the Meadow Gold employees with layoff. In effect, Respondent was holding the Meadow Gold employees hostage to its intransigent demand that it be allowed to assume the old Farmer Jack agreement.

Respondent argues that there is no evidence of animus respecting this conduct and, absent such a finding, no violation of Section 8(a)(3) of the Act may be found. Respondent further argues that its conduct resulted from the lack of agreement during effects bargaining concerning the Meadow Gold closure and that both its bargaining and its actions respecting Meadow Gold unit employees at the Farmer Jack plant were proper under the Act.

I have found, supra, that Respondent did not violate the Act as alleged in paragraph 12(a) of the complaint by assuming the Borman Farmer Jack contract. The General Counsel did not separately allege a failure to bargain respecting the new Farmer Jack unit but that broad allegation may be fairly held to be implicit in the other allegations of the complaint. Has the General Counsel met its burden of proof that Respondent bargained in bad faith respecting the new consolidated Farmer Jack unit?

No contention has been made that Respondent failed to satisfy the procedural obligations of good faith bargaining such as meeting with the Union on demand. Respondent proposed both initially and virtually throughout the bargaining, that the parties, in

effect, sign a new contract which mirrored the Borman contract save in certain non-economic matters which were designed to accommodate the Meadow Gold unit transferees. The Union however, especially in the bargaining preceding the transfers, proposed few if any changes in the terms and conditions of original or non-Meadow Gold Farmer Jack unit employees. I find no real dispute that, leaving out the category of employees discussed below and characterized here as Meadow Gold unit transferees, there was no significant dispute between the parties about the Farmer Jack unit at least until late in bargaining and no sustainable contention that Respondent's bargaining was in violation of the Act respecting that unit.

The strong and continuing differences between the Union and Respondent concerned the Meadow Gold employees and the contract terms and conditions they would carry with them to the Farmer Jack facility in the form of changes to that contract. This bargaining may be characterized with some accuracy as either effects bargaining respecting the Meadow Gold unit or perhaps bargaining concerning the new merged unit. It was not bargaining concerning the old Farmer Jack unit employees except indirectly to the extent that those employees' conditions would be modified to combine seniority and other rights with Meadow Gold transferees. The Union sought in bargaining to carry over the Meadow Gold contract terms, at least for the transferees from the Meadow Gold unit, into a new Farmer Jack contract — via "red circled rates." Respondent, while willing to accede to the Union's proposals respecting seniority, sought to preserve the very favorable economic terms of the Borman contract in any new contract by refusing to make any economic concessions regarding Meadow Gold transferees once working in the Farmer Jack unit. Respondent sought to achieve its goal — setting aside the non-economic concessions respecting seniority — by limiting its

proposals and concessions in the effects bargaining concerning the Meadow Gold employees to one-time transfer and separation payments for Meadow Gold employees which would not effect transferee's terms and conditions of employment once at the Farmer Jack plant.

The General Counsel's allegation that Respondent bargained in bad faith respecting the Farmer Jack unit must then be considered as a more general allegation that Respondent bargained in bad faith concerning the new merged unit. In considering that allegation Respondent's position and concessions respecting the Meadow Gold effects bargaining must also be considered for, as noted above, these proposals are part and parcel of the merged unit bargaining. Considering the bargaining as a whole, including the proposals of Respondent for Meadow Gold severance and transfer payments, I find that the General Counsel has failed to sustain his burden of proof that Respondent bargained in bad faith. Respondent actively sought to preserve for itself the concessions earlier granted to Borman. It sought to do so in the merged unit by its limiting concessions to one-time payments which would not raise the wage rates of any employee once working at the Farmer Jack facility. Neither Respondent's goal nor its chosen means of achieving that goal are evidence of bad faith. Since neither Respondent's means nor ends in bargaining were improper and since it met the procedural requirements for bargaining, no violation of Section 8(a)(5) and (1) of the Act may be found. As noted elsewhere in this decision, Respondent violated Section 8(a)(1) and 8(a)(5) and (1) of the Act by making improper and illegal statements to employees respecting bargaining and union representation. The totality of this conduct away from the bargaining table, however, does not rise to a level sufficient to independently sustain a general failure to bargain in violation of Section 8(a)(5) of the Act.

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Having found no violation of Section 8(a)(5) of the Act in Respondent's bargaining, it follows that the General Counsel's allegation that Respondent violated Section 8(a)(3) and (1) of the Act by laying off some Meadow Gold employees and transferring others must fail. The General Counsel does not contend Respondent had an obligation, statutory or contractual, to transfer Meadow Gold employees to the Farmer Jack facility. The allegation turned on the further allegation that Respondent took the action in furtherance of a course of conduct violative of the Act. Having found the underlying bargaining not illegal, it follows the General Counsel's prima facie case as to the transfers fails and I so find.[15] Accordingly, I shall dismiss this allegation of the complaint.

b. *Complaint Paragraph 5 as a Violation of 8(a)(1) of the Act and a Direct Dealing violation of Section 8(a)(5) and (1) of the Act. The Threat to Lay Off and/or Refuse to Transfer Employees Unless the Union Accepted Respondent's Last Offer.*

There is essentially no dispute that the employee meetings held on March 9 and 10, 1988, were intended by Respondent to generate employee pressure on the Union to accept Respondent's last proposal concerning the Meadow Gold closure and the

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15. In the typical situation wherein a union has proposed substantial wage increases in bargaining and the employer has agreed to those increased wages or proposed increases of a different level, the employer often refuses to implement the increases until an entire new contract is agreed to. The motivation is, of course, to withhold the wage increase to employees as a bargaining tactic to pressure the union to quickly come to agreement and thus obtain the increases. This rather common bargaining strategy is not a violation of the Act. In the instant case, Respondent's conduct may be similarly seen as an attempt to withhold the benefits of a proposal until complete agreement is reached in order to induce pressure for union acceptance. The Board finds no violation in such cases.

consolidation of operations at the Farmer Jack facility. More specifically, Respondent's agents sought to induce employee attempts to obtain a ratification vote and ratify Respondent's offer at the forthcoming union meeting scheduled for the evening of March 10, 1988.

The inducements to employees to act with alacrity were both carrot and stick. Respondent's agents described their proposal which included substantial employee transfer and severance payments — carrots with an immediate cash value. They also stated that, unless the proposals was accepted by the Union "very, very soon", Respondent would be forced to lay off the Meadow Gold employees without transfer rights or severance pay and to hire new employees "off the street" for the Farmer Jack positions — the stick of seniority loss and the threat of unemployment. Respondent clearly told employees that Respondent could not do otherwise i.e. it had no choice in the matter unless and until its proposal was accepted by the Union. There is also no dispute, and I find, that these statements to the employees were false in that Respondent was under no compulsion to take the actions that it claimed it would be forced to take.

The General Counsel argues that Respondent's conduct constitutes an unlawful threat in violation of Section 8(a)(1) of the Act and, further, was an attempt to bypass the Union and deal directly with unit employees in violation of Section 8(a)(5) and (1) of the Act.[16] The two allegations depend on the same facts but different legal analysis and deserve separate treatment.

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16. In footnote 2 of his brief at 22, Counsel for the General Counsel concedes this conduct was not specifically alleged in the complaint as a violation of Section 8(a)(5) and (1) of the Act, but argues it was "unlawful activity . . . related to and intertwined with the allegations of the complaint" and was fully litigated and may

(Cont'd)

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i) Respondent's Conduct as an Independent Violation of Section 8(a)(1) of the Act.

The General Counsel argues, in parallel with his argument in support of the Section 8(a)(3) contentions described above, that Respondent's threats to deny transfer rights to Meadow Gold employees were undertaken to frustrate the bargaining process and avoid its bargaining obligation. The General Counsel argues on brief that Respondent "attempted to substitute a threat of termination for good faith negotiations. In doing so, Respondent violated Section 8(a)(1) of the Act."

Respondent argues that its "threat", that employees would be laid off unless the Union accepted Respondent's final offer, was not improper unless the layoffs themselves were improper. Respondent argues on brief: "[I]t is not unlawful to threaten to do what one can, in fact, lawfully do." I agree. I have found, supra, that Respondent did not in fact violate Section 8(a)(3) and (1) of the Act in refusing to transfer the Meadow Gold employees as alleged in the complaint. It follows, therefore, that Respondent's statements to employees do not violate Section 8(a)(1) of the Act as alleged in the complaint. I shall therefore dismiss paragraph 5 of the complaint.

ii) Respondent's conduct as a Violation of Section 8(a)(5) and (1) of the Act.

(Cont'd)
therefore be found to be a violation of Section 8(a)(5) and (2) of the Act as well as a violation of Section 8(a)(1) of the Act as specifically alleged in the complaint citing *Doral Hotel & Country* NLRB 1112, fn. 2 (1979); *Bay Area-Los Angeles Express, Inc.*, 275 NLRB 1063 1081 (1985). The General Counsel's cited cases are persuasive on the issue and I shall consider the direct dealing allegation as if pled.

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The General Counsel contends that Respondent's conduct was also an attempt to bypass the Union and deal directly with Meadow Gold employees. The law in this area was aptly summarized by Judge Pollack, with Board approval, in *Ad-Art, Inc.*, 290 NLRB No. 74 (July 29, 1988) at p. 30 of ALJD:

> Section 8(a)(5) creates an obligation on the part of an employer to bargain with an incumbent union as the exclusive bargaining representative of its employees in the matter of wages, hours, terms and conditions of employment. It may not attempt to circumvent the exclusive status of the bargaining agent by attempting to deal directly with its represented employees. *Medo Photo Supply v. NLRB*, 321 U.S. 678 (1944). An employer must deal in bargaining negotiations with the statutory representative and cannot bargain directly or indirectly with the employees. *NLRB v. Insurance Agent's International Union, AFL-CIO (Prudential Ins. Co.)*, 361 U.S. 477, at 484-485 (1960). "The employer's statutory obligation is to deal with the employees through the union, and not with the union through the employees." *General Electric Company*, 150 NLRB 192, at 195 (1964).

In *Ad-Art* the board found a violation of Section 8(a)(5) and (1) of the Act when the employer "sought to exert pressure on the Union by offering a wage increase to the employees and by threatening the employees with a loss of work opportunities if the Respondents' offer was not accepted", 290 NLRB No. 74, ALJD at 30. In the instant case in order to exert pressure on the Union to

accept its final offer, Respondent sought to stimulate employee efforts to bring the proposal before the membership for ratification. Respondent accomplished this by falsely telling employees that, unless the Union accepted the offer, Respondent was powerless to do other than lay off the Meadow Gold employees and hire other new employees "off the street" for the vacancies at the Farmer Jack plant.

Respondent's goal and its means were improper and together constitute a violation of Section 8(a)(5) and (1) of the Act. As the cases cited indicate, Respondent was obligated to deal with the Union, not employees, in bargaining. Indeed, a union's submission of contracts for ratification by its members is a matter of internal union business, a non-mandatory subject of bargaining and a matter of legitimate concern to the Union and its members only. Respondent could not properly insist that its proposal be submitted to the Union membership for consideration nor could Respondent properly seek to achieve such a result through pressure on the employees.

Second, Respondent's statements to employees were improper. As the General Counsel concedes on brief with case citation, "an employer has a fundamental right to communicate with its employees concerning its position in collective-bargaining negotiations." Rather, than simply inform employees of the positions of the parties, however, Respondent, through Mr. Finnerty, Respondent's Assistant Director of Labor Relations, falsely stated that unless the Union accepted its last offer, Respondent had no choice but to lay off employees, omit severance and transfer payments and hire new job applicants for Farmer Jack vacancies. These statements, exactly like those of the employer found violative in *Ad-Art,* supra, falsely tell employees that actions adverse to employees may be avoided only by the Union agreeing

with the employer's demands. The obvious truth, however, and one which must reasonably have been known to Mr. Finnerty and Respondent's other officials, but clearly was not so understood by the employees, was that a variety of options were available to Respondent whether the Union accepted Respondent's last offer or not.

I find that Respondent's false statements to employees were designed to create and did create the mistaken belief among the employees that, absent union agreement with Respondent's last offer, Meadow Gold unit employees would, of necessity, be laid off and lose both severance and transfer payments and job opportunities. I further find that these false impressions were created by Respondent in order to induce employee efforts to bring Respondent's last offer before the Union membership for approval and/or to create further employee efforts with the International to induce Union agreement. In the event Respondent's efforts were successful insofar as employee actions, as noted above, were induced. Respondent's conduct, involving first, the communication of willful falsehoods to employees concerning the consequences of the Union's refusal to accept Respondent's last offer and, second, involving the inducement of employee efforts concerning ratification of the proposal and subsequent efforts to cause the International to pressure the Union to accept the employer's proposal, constitute an improper attempt to bargain with the Union through the employees in violation of Section 8(a)(5) and (1) of the Act. I so find.

6. Summary

As set forth above, I have considered the allegations of the complaint as well as the additional allegation that the conduct alleged in paragraph 5 violated Section 8(a)(5) and (1) of the Act. I

have sustained the General Counsel's allegations as to the 8(a)(5) and (1) aspect of complaint paragraph 5 as well as paragraph 12(c) of the complaint. I have otherwise found without merit paragraphs 5, 6, 12(a) and 12(b) of the complaint and shall dismiss these paragraphs. No other action paragraphs remain to be resolved. Further, I have rejected the argument of the Charging Party that the Farmer Jack unit accreted into the Meadow Gold unit and hence was covered by the Meadow Gold collective bargaining agreement.

More specifically, I have found that Respondent in meetings in February and March 1988, attempted to bypass the Union and undermine its representational role among Meadow Gold unit employees by dealing directly with unit employees concerning terms and conditions of employment as described in greater detail above. This conduct violates Section 8(a)(5) and (1) of the Act and shall be remedied as set forth infra. I have also found that the February offer of improved benefits to the Meadow Gold clerical employees, if they abandoned the Union, also violated Section 8(a)(1) of the Act.

I have found that Respondent did not improperly threaten to deny transfer rights to unit employees in violation of Section 8(a)(1) of the Act and did not improperly withhold the transfer of employees in violation of Section 8(a)(3) and (1) of the Act as alleged. Further, I have found that Respondent did not improperly assume the Borman Farmer Jack agreement or improperly apply the Farmer Jack working conditions to Meadow Gold unit transferees in violation of Section 8(a)(5) and (1) of the Act as alleged.

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REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefore and take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall be required to cease and desist from bargaining directly or attempting to bargain directly with employees during negotiations with the Union which conduct results in bypassing the Union and/or undermining its role as the exclusive representative of unit employees. Further, Respondent shall be ordered to cease and desist from offering improved benefits to employees if they will abandon the Union. More specifically, Respondent shall cease and desist from telling unit employees that terms and conditions of employment will be improved if the Union no longer represents employees. Respondent shall also cease and desist from making misrepresentations of fact or law to employees concerning negotiations which falsehoods tend to undermine the Union's representational role. Finally, since the violations found involve clerical employees at the Meadow Gold site and employees now at the Farmer Jack site, posting shall be directed at both locations.

Conclusions of Law

Based on the above findings of fact and the record as a whole, I make the following conclusions of law.

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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3. The Union has been, until the unit consolidation occurring over a period of months ending in October 1988, the exclusive representative of Respondent's employees in two units as described below.

(a) The Meadow Gold Unit

> All employees of Respondent as described in Supplements to the May 1, 1987 through November 1, 1990 collective bargaining agreement between Respondent and the Central and Southern Conference of Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters.

(b) The Old Farmer Jack Unit

> All employees of Respondent as described in Appendix "A" of the Milk/ Ice Cream/Cultured Products Plants Agreement between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992.

4. The Union since the consolidation of units described above has been and is now the exclusive representative of Respondent's employees in the unit described below (the New Consolidated Farmer Jack unit).

> All employees of Respondent as described in Supplements to the May 1, 1987 through

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November 1, 1990 collective bargaining agreement between Respondent and Central and Southern Conference Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters and all employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992, employed at Respondent's Farmer Jack facility.

5. The units described above are and each of them is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. By offering employees increased benefits if they abandoned Union representation, Respondent violated Section 8(a)(1) of the Act.

7. By attempting to deal directly with unit employees in February and March 1988 by promising them better terms and conditions of employment, if they abandoned the Union, and by making material misrepresentations of the necessity of withholding employee rights to transfer to another facility unless the Union accepted Respondent's last offer, in order to induce employee pressure on the Union to accept Respondent's last offer, Respondent attempted to bypass the Union, thereby undermining its role as the exclusive representative of employees in collective bargaining and, in so doing, Respondent violated Section 8(a)(5) and (1) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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9. Respondent has not otherwise violated the Act as alleged in the complaint.

ORDER

Based upon the above findings of fact and conclusions of law and on the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended Order.[17]

Borden, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Offering employes increased benefits if they abandon Union representation.

(b) Dealing directly with employees concerning terms and conditions of employment of unit employees, thereby undermining the role of the Union as the exclusive representative of unit employees for the purpose of collective bargaining.

(c) Failing to bargain in good faith with Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222, AFL-CIO as the exclusive representative of employees in the following unit:

All employees of Respondent as described in

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17. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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Supplements to the May 1, 1987 through November 1, 1990 collective bargaining agreement between Respondent and Central and Southern conference of Teamsters and Local Union Nos. 222 and 976 of the Western conference of Teamsters and all employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992, employed at Respondent's Farmer Jack facility.

(d) In any like or related manner restraining and coercing employees in the exercise of the rights provided them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Recognize and bargain with the Union as the exclusive bargaining representative of employees in the unit set forth above.

(b) Post at its Meadow Gold and Farmer Jack facilities in Salt Lake City, Utah, copies of the attached notice marked "Appendix."[18] Copies of the notice on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted by

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18. If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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Respondent immediately upon receipt and maintained for sixty (60) consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply.

Issued at San Francisco, California this 24th day of January, 1990.

s/ Clifford H. Anderson
Clifford H. Anderson
Administrative Law Judge

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APPENDIX

Notice to Employees

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

After a trial at which we participated and submitted evidence and argument, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and abide by its terms.

WE RECOGNIZE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 222, AFL-CIO AS THE EXCLUSIVE REPRESENTATIVE OF OUR EMPLOYEES IN THE BARGAINING UNIT DESCRIBED BELOW. Only the Union represents our unit employees concerning wages, hours and working conditions. We are obligated by law to bargain only with the Union concerning these conditions. We will do nothing to undermine the Union in performing that role. More particularly we give all our employees and the Union the following assurances.

WE WILL NOT promise, directly or impliedly, improved terms and conditions of employment if employees abandon Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222, AFL-CIO as their representative for collective bargaining.

WE WILL NOT bypass the Union and deal with employees directly concerning terms and conditions of employment or other matters properly the responsibility of the Union.

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WE WILL NOT make misstatements or mischaracterizations regarding negotiations or the consequences of agreements or disagreements with the Union. More specifically, we will not tell employees that unless the Union accepts our last offer regarding employee transfers to the Farmer Jack facility, we will be forced to deny employees transfers and will further be forced to layoff employees at the Meadow Gold plant and hire new employees "off the street" at the Farmer Jack facility.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of their rights set forth in Section 7 of the National Labor Relations Act.

WE WILL recognize and bargain in good faith with the Union as the exclusive representative of our employees in the following unit which resulted from the merger of the represented units at the Meadow Gold and Farmer Jack facilities.

> All employees of Respondent as described in Supplements to the May 1, 1987 through November 1, 1990 collective bargaining agreement between Respondent and Central and Southern Conference Teamsters and Local Union Nos. 222 and 976 of the Western Conference of Teamsters and all employees of Respondent as described in Appendix "A" of the Milk/Ice Cream/Cultured Products Plants Agreement Between Borman's Acquisition Corp. and the Union which agreement contains an expiration date of April 30, 1992, employed at Respondent's Farmer Jack facility.

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BORDEN, INC.

Dated: _____ _____
(Signature)

_____
(Title)

Cases 27-10412
27-CA-10412-2
27-CA-10412-3

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 600 17th St., 3rd Floor, S. Tower, Denver, Colorado 80202-5433; Telephone: (303) 844-3551.

APPENDIX D — ORDER OF THE TENTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-9548

BORDEN, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TEAMSTERS LOCAL 222, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO,

Intervenor.

ORDER
Entered April 18, 1994

Before McKAY, HOLLOWAY and GARTH*, Circuit Judges.

* Honorable Leonard I. Garth, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

This matter comes on for consideration of petitioner's petition for rehearing.

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Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

Mr. William F. Schoeberlein
Otten, Johnson, Robinson, Neff & Ragonetti
950 17th Street
Suite 1600
Denver, CO 80202

APPENDIX E — LETTER FROM THE TEAMSTERS TO BORDEN, INTRODUCED AS JOINT EXHIBIT 14 DURING THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS

Affiliated with the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America

2841 South 3870 West - P.O. Box 30749 - Salt Lake City, Utah 84130

LOCAL UNION 222 PHONE (801) 972-1898
1-(800) 824-4352

November 12, 1987

Mr. Tony Ward
General Manager/Utah Division
BORDEN'S MEADOW GOLD DAIRY
1030 South Main Street
P. O. Box 2490
Salt Lake City, Utah 84110

Gentlemen: NOTE: Hand Delivered

It has come to my attention that a sale of the assets of Farmer Jack Cultured Products, Milk & Ice Cream Plants has occured. It is may further understanding that your company has acquired the full compliment of bargaining unit employees previously under contract with Farmer Jack.

The purpose of this letter is to request an immediate meeting to negotiate the wages, hours, and working conditions of all

employees (all Farmer Jack and Meadow Gold) affected by this sale. Further, this letter is to request that the present Farmer Jack Labor Agreement not be unilaterally altered by your company pending completion of these negotiations.

I would like to hear from you in the immediate future regarding a convenient day, time, and place to commence these negotiations.

Sincerely yours,

s/ Ralph J. Taurone
Ralph J. Taurone
Secretary/Treasurer
TEAMSTERS LOCAL 222

RJT/bkm
cc: Jay Johnson, V.P. Gen. Mgr. Borden's Meadow Gold Dairy
Neil J. Finerty, Labor Relations Borden's Inc.
Stephen W. Cook, Attorney
Dino Apedaile, Business Representative
Jim Roberts, President Joint Council of Teamsters #2

APPENDIX F — ADVICE MEMORANDUM FROM NATIONAL LABOR RELATIONS BOARD DIVISION OF ADVICE TO REGIONAL DIRECTOR, INTRODUCED AS JOINT EXHIBIT 34 DURING THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE

UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

DATE: July 13, 1988

TO: W. Bruce Gillis, Jr., Regional Director Region 27

FROM: Harold J. Datz, Associate General Counsel Division of Advice

SUBJECT: Borden, Inc. Cases 27-CA-10412-2-3

First National Maintenance Chron
240-3367-8312-8400
347-4050-1733
385-7533-4020-6700
530-6067-4011
530-6067-4022
530-8018-2550
530-8018-2562
530-8018-2569

These Section 8(a)(1), (3) and (5) cases were submitted for advice on the following issues: (1) whether the successor Employer lawfully assumed the predecessor employer's collective-bargaining agreement; (2) whether employees at a newly acquired unionized facility constitute an accretion to the

Employer's other unionized facility; (3) whether the Employer has a duty to arbitrate the above accretion issue; (4) whether the Employer engaged in direct dealing with or threatened employees; and (5) whether the Employer refused to bargain about the effects of its decision to close one of its facilities.

FACTS

Borden, Inc. (the Employer), and Teamsters Local Unions Nos. 222 and 976 (the Union), are parties to a collective-bargaining agreement covering the Employer's Meadow Gold plants. The contract is in effect from May 1, 1987 to November 1, 1990.[1] The Meadow Gold facility in issue here is located in Salt

1. The Meadow Gold Agreement contains the following provisions:

ARTICLE XXXII *(MANAGEMENT RIGHTS)*

> The Union recognizes that it is the exclusive right of the Company to manage its business as heretofore, including the right to determine the products to be manufactured, the location of its plant(s) and the right to close down its plant(s), to establish standards of production and standards of maintenance, to assign work, provided that in the exercise of these rights the Company will not violate any of the terms of this Agreement.

ARTICLE XLIX *(SUBCONTRACTING)*

> *SECTION 1.* The Company shall notify the Union concerning the transfer or subcontracting of bargaining unit work affecting the status of employees presently performing the work. The Union shall have the opportunity of negotiating the effects of the change on the employees affected.

(Cont'd)

Lake City, Utah. It has approximately 75 to 80 production employees and 25 clerical employees. Local 222 was also party to a collective-bargaining agreement with Borman's Acquisition Corp. for 46 production employees at its Farmer Jack facility. Farmer Jack is also located in Salt Lake City, Utah, 3-1/2 miles from the Meadow Gold facility. The Farmer Jack contract, which expires on April 30, 1992, provides for lower wages than the Meadow Gold contract.[2] The Farmer Jack contract does not contain a successorship clause.

Upon learning that Borman's intended to sell its Farmer Jack facility to Borden, the Union demanded "effects" bargaining by letter dated October 2, 1987.[3] During the first week of November, the Union met with Borman's representatives who stated that the Employer intended to buy the Farmer Jack facility and to assume the collective-bargaining agreement. The Union told Borman's that it would not agree to the Employer's assumption of the Farmer Jack agreement.

On November 7, the Employer purchased the Farmer Jack facility. The Assets Purchase Agreement provided that the Employer succeeded to the existing collective-bargaining agreement. By letter to the Employer dated November 12, the Union requested:

(Cont'd)

> *SECTION 2.* The amount of any termination or severance pay shall not be subject to the grievance procedure.

2. The Union granted concessions to Borman's when it negotiated the Farmer Jack contract because Borman's was a relatively small employer.

3. All dates hereinafter are in 1987 unless otherwise indicated.

Appendix F

> An immediate meeting to negotiate the wages, hours, and working conditions of all employees (all Farmer Jack and Meadow Gold) affected by this sale. Further, this letter is to request that the present Farmer Jack Labor Agreement not be unilaterally altered by your company pending completion of these negotiations.

On January 5 and 6, 1988,[4] the Employer and the Union met for negotiations. The Union's position was that Farmer Jack employees constituted an accretion to the Meadow Gold unit and were therefore covered under the Meadow Gold contract. The Employer, on the other hand, stated that it had lawfully assumed, albeit without Union consent, the Farmer jack contract which would cover all employees working at the Farmer Jack facility. In order to reconcile their two positions and to grant concessions to the Employer, the Union presented a contract proposal dated January 6,[5] that was meant to cover all Meadow Gold and Farmer Jack employees who are or will be employed at the Farmer Jack facility; the proposal called for the application of the master Meadow Gold contract, but with a Utah supplement which would grant concessions to the Employer.[6] The Union's proposal further

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4. All dates hereinafter are in 1988.

5. We note that the January 6 proposal is dated 1987, not 1988. We assume that this was an inadvertent error.

6. Paragraph 9 of the proposal stated:

> It is understood and agreed that these provisions of the respective Meadow Gold/Borden Labor Agreements covering the States of Utah, Idaho and Montana and the

(Cont'd)

provided that it was not intended to prejudice the Union's position should the Employer reject its proposal.

When the parties met again on January 13, the Employer presented its "final offer" to the Union. Its proposal provided for: (1) transferring Meadow Gold employees to the Farmer Jack facility on a staggered basis from February 1 to July 4, at which time the Meadow Gold facility would be permanently closed, and (2) applying the Farmer Jack contract to all employees working at that facility.[7] The employer told the Union that if it refused to accept its offer, the Employer would not transfer any Meadow Gold employees to the Farmer Jack facility.

On January 27, the Employer announced to Meadow Gold employees that it would begin transferring employees and work on February 15. On January 28 or 29, the Union filed a grievance claiming that the Meadow Gold contract should apply to all employees working at the Farmer Jack facility. On March 9, the Employer refused to arbitrate this grievance.

(Cont'd)

> Farmer Jack/Borden Salt Lake City, Labor Agreement shall remain in full force and effect through 4-30-92, except as a [sic] clearly and expressly modified herein.

Further, the proposal provided, inter alia, for: "red circling" (freezing) the wages of transferred Meadow Gold employees but giving periodic wage increases to non-"red-circled" employees; extending the Meadow Gold contract to April 30, 1992; transferring Meadow Gold employees by seniority; covering new hires, if any, under the terms of its Farmer Jack contract; substituting the Meadow Gold Health and Welfare plan for the Union's plan; settling all existing labor controversies.

7. The proposal also provided for dovetailing of seniority; a transfer bonus; severance pay; recall rights; and a 1-month extension of health benefits for employees who were not transferred.

Appendix F

On March 9 and 10, the Employer held meetings with Meadow Gold employees at which it discussed in detail both its January 13 offer to the Union and its plans to transfer employees. The Employer stated, however, that if the Union did not agree to its offer, it would be forced to "hire off the street" and would not transfer any employees. The Employer added, "I hope you will take advantage of your rights to vote on this matter and that your questions have been answered. We don't know why the Borden offer was not voted on."

* * *

Shortly after these meetings, employees circulated a petition addressed to Jackie Presser, General President of the IBT, in which they demanded their "right" to vote on the Employer's contract proposal.[11] On March 14 and 16, however, several employees wrote to the Union stating that they signed the petition because they felt "intimidated" by the Employer's position that they would be terminated if the Union did not accept the Employer's proposal. The parties met again on March 29 and once in June. To date, no agreement has been reached.

It appears that the Employer is continuing to apply the Farmer Jack contract to that facility. Further, it appears that the Employer has transferred only 10 percent of the Meadow Gold unit. The rest of the bargaining unit were to be terminated by July 1 when the Meadow Gold facility was scheduled to close. Farmer Jack, a relatively new facility, is twice the size of the Meadow Gold facility. The Employer has moved its Meadow Gold accounts to the

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11. There is no evidence that the Employer instigated or encouraged this petition.

Farmer Jack facility, which will service Meadow Gold's customers as well as its own. The Farmer Jack facility will maintain the same organization and nature of work, supervisory staff, labor relations policies, manufacturing and production processes as the Meadow Gold facility. The Employer will transfer some equipment from Meadow Gold, and will purchase some additional equipment for the Farmer Jack facility.

ACTION

* * *

All other allegations should be dismissed, absent withdrawal.

1. *Contract Assumption*

One of the most fundamental policies of the Act is freedom of contract.[12] Thus, in *Burns*,[13] the Court, in holding that a successor employer is not obligated to honor the collective-bargaining agreement executed by its predecessor, reasoned:

> This bargaining freedom means both that parties need not make any concessions as a result of government compulsion and that they are free from having contract provisions imposed upon them against their will. . . . [Thus], holding either the union or the new employer bound to the substantive terms of an old collective bargaining contract may result in

12. *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 102 (1970).

13. *NLRB v. Burns Int'l. Security Services*, 406 U.S. 272 (1972).

> serious inequities. . . . [A] union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. Id. at 287-288.

However, if a successor employer retains all or a majority of the employees in the unit, it must initially bargain with the union before it makes any changes in existing terms and conditions of employment. *Burns,* supra at 295. Based on the above, we conclude that the Employer, as successor,[14] could not lawfully change any terms and conditions of employment without first bargaining with the Union. However, *Burns,* supra, also teaches that the Employer also could not assume *unilaterally* its predecessor's collective-bargaining agreement. Thus if the Employer finds it "advantageous not only to recognize and bargain with the Union but also to observe the pre-existing contract rather than face uncertainly and turmoil," id. at 291, the Employer must first obtain agreement from the Union.

The Union here, however, has consistently refused to allow the Employer to assume the Farmer Jack contract that the Union had negotiated with Borman's. Thus, in a meeting with Borman's to discuss the sale during the first week of November, 1987, the Union told Borman's that it would not agree to the Employer's

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14. We note that the Employer is doing the same work at the same location and has retained all of its predecessor's employees. *Burns,* supra. Further, the Asset Purchase Agreement between the Employer and Borman's for the purchase of the Farmer Jack facility provided that the Employer would be a successor employer under the existing collective bargaining agreement with Teamsters Local #222 with respect to the milk plant and yogurt plant. The purchase agreement also noted that the Employer acknowledged that Borman was not guaranteeing that the Employer would become a successor "entitled to any rights" under the existing collective bargaining agreement.

assumption of its Farmer Jack contract. Then, by letter to the Employer dated November 12, 1987 the Union requested: (1) that the Employer negotiate for all Farmer Jack and Meadow Gold employees, and (2) that no unilateral changes be made in the Farmer Jack contract pending negotiations.[15] When the Employer and the Union first met on January 5 and 6, 1987, to discuss the Farmer Jack acquisition, the Union stated that the Farmer Jack unit constituted an accretion to the Meadow Gold unit and, therefore, the Meadow Gold contract should be applied to the Farmer Jack employees. The Employer's position was that it could unilaterally assume the Farmer Jack contract and had done so in its Asset Purchase Agreement. In order to reconcile their two positions, the Union offered its January 6 proposal, which modified the Meadow Gold contract.[16] Thus, it is clear that the Union never agreed to allow the Employer to assume the Farmer Jack agreement. In the absence of such agreement, *Burns,* supra, teaches that the Employer and the Union were not bound to the Farmer Jack contract; absent impasse, the Employer was merely bound not to make unilateral changes in terms and conditions of employment.[17]

2. *Accretion*

The Board has followed a restrictive policy in finding accretion because it forecloses employees' basic right to select

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15. We note that by requesting maintenance of the status quo pending negotiations, the Union was not proposing that the Employer assume the Farmer Jack contract, but rather was merely demanding that the Employer make no unilateral changes during negotiations.

16. See fn. 6.

17. The Region has determined that the Union presented no evidence to support its unilateral changes allegations.

their bargaining representative.[18] The Board considers a number of factors in determining whether accretion is appropriate, "including the integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control over labor relations, collective-bargaining history, and interchange of employees."[19] The degree of actual interchange and any common day-to-day supervision of employees are especially important factors to a finding of accretion.[20] However, "no weight is given to the fact that interchange is feasible when in fact there has been no actual interchange of employees."[21]

The Board's accretion guidelines also apply to a consolidation of existing facilities.[22] In *Central Soya Co.*, supra, for example, the Board held that an employer that transferred employees and operations from two unionized plants to a newly acquired facility violated Section 8(a)(5) by, inter alia, refusing to apply its existing collective-bargaining agreement to the new facility. The Board reasoned that there was no substantial change in operations following the relocation and consolidation and that the transferred

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18. *Towne Ford Sales*, 270 NLRB 311 (1984), enfd. 759 F.2d 1477 (9th Cir. 1985).

19. *TRT Telecommunications Corp.*, 230 NLRB 139, 141 (1977); *Safeway Stores*, 276 NLRB 944, 947-48 (1985).

20. *Hotel and Restaurant Employees and Bartenders International Union, Local 274 (Hospitality Catering, Inc.)*, 282 NLRB No. 139, slip op. at 4 (1987).

21. Id.

22. *Central Soya Co.*, 281 NLRB No. 173 (1986); *Public Service Co. of New Hampshire*, 190 NLRB 350 (1971).

employees constituted a majority of the combined work force at the new facility "at the time of relocation."[23]

Applying the above principles to the instant case, we conclude that the Farmer Jack facility is not an accretion to the Meadow Gold unit. In this regard, we note first that when the Employer bought the Farmer Jack facility, it succeeded to a bargaining unit of employees with an identity separate and apart from the Meadow Gold unit. Although both facilities produce the same product under similar working conditions, there has been no interchange of employees or common day-to-day supervision, factors which are critical to a finding of accretion.[24] Second, any centralized administrative control is not dispositive to a finding of accretion.[25] Third, although the Employer had proposed in negotiations to transfer a majority of Meadow Gold employees to the Farmer Jack facility, it appears that since no Employer-Union agreement has been reached, the Employer has transferred at most ten percent of the Meadow Gold unit, and planned to terminate the remaining employees by July 1, 1988. Thus, when Meadow Gold completes the relocation and the consolidation of its operations with the Farmer Jack facility, Meadow Gold employees will not constitute a majority of bargaining unit employees, which *Central Soya Co.*, supra, teaches is necessary for a finding that Meadow Gold's contract follows the transferred employees to the new facility. In

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23. *Central Soya Co.*, supra, slip op. at 12. Compare *Harte & Co.*, 278 NLRB 947, 949 (1986) where the Board held that an employer and a union lawfully extended their collective-bargaining agreement to a new facility even though it took 8 months for the employer to relocate its operations and the transferred employees constituted 40% of the workforce.

24. *Town Ford Sales*, supra.

25. *Safeway*, supra at 950.

short, since there is no accretion, the Employer can lawfully refuse to apply the Meadow Gold contract to the Farmer Jack facility.[26]

3. *Meetings with Employees*

"[A]n employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees concerning its position in collective-bargaining negotiations and the course of those negotiations."[27] Thus, "the fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith."[28] In *United Technologies Corp. II,* supra, for example, the Board found lawful an employer's communicating to employees the terms of its offer to the union. The Board reasoned that the employer's communications were noncoercive and that the employer

> acknowledges the [u]nion's rightful role as the employee's statutory bargaining representa-

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26. The Union's charge that the Employer violated Section 8(a)(5) by refusing to arbitrate the issue of accretion should be dismissed. "The Board has consistently declined to leave to an arbitrator the responsibility for determining unit questions such as whether a newly acquired plant is an accretion to an existing bargaining unit covered by a collective-bargaining agreement." *Massachusetts Electric Co.,* 248 NLRB 155, 156 (1980).

27. *United Technologies Corp.,* 274 NLRB 1069, 1074 (1985), enfd. 789 F.2d 121 (2d Cir. 1986) (*United Technologies I*); *United Technologies Corp.,* 274 NLRB 609 (1985), enfd. 789 F.2d 121 (2d Cir. 1986) (*United Technologies II*).

28. *United Technologies Corp. II,* supra, 274 NLRB at 610, citing *Proctor and Gamble Manufacturing Co.,* 160 NLRB 334, 340 (1966).

> tive. There was no suggestion that the employees should abandon their [u]nion and negotiate for better terms directly with the [employer]. Furthermore, the [employer's] communications occurred in the context of lawful conduct at the bargaining table, and it was therefore not undertaken as part of a strategy to frustrate the bargaining process or otherwise avoid bargaining obligations under the Act. 274 NLRB at 611.

Similarly, in *United Technologies Corp. I,* supra, the Board found lawful an employer's publicity campaign that criticized the union's contract demands and tactics and set forth the employer's own version of the progress of negotiations. The Board reasoned that all of the employer's proposals or ideas communicated to employees were first submitted to the union at the bargaining table. Further, the employer acknowledged the union's role as the statutory representative by urging the employees to discuss the course of negotiations with their union representatives and to attend and participate in the ratification vote.

* * *

Based on the above, we conclude that the Employer lawfully discussed and urged employees to ratify its January 13 proposal to the Union. In this regard, we note that, as in *United Technologies Corp. I* and *II* discussed supra, there is nothing in the Employer's discussion of its proposal which indicates an effort by the Employer to bargain directly with employees or to encourage them to abandon their Union to achieve better terms directly from the Employer. Indeed, the Employer's proposal was submitted to the Union prior to its disclosure to the employees. Moreover, the

Employer acknowledged the Union's rightful role by urging employees to ratify the proposal.

Further, the Employer's statement that it would be forced to "hire off the street" and not to transfer any employees is, in our view, a simple statement of fact that: (1) the Employer had the right to relocate and consolidate as long as it negotiated with the Union under article XLIX (subcontracting) about the *effects* of its decision on bargaining unit employees and (2) absent agreement, the Employer would be free to hire off the street instead of transferring employees.

* * *

4. *Effects Bargaining*[30]

We conclude that the Employer bargained with the Union in good faith about the effects of its decision to close its Meadow Gold facility and transfer operations and employees to the Farmer Jack facility.[31] In this regard, we note that by letter to the Employer dated November 12, 1987 the Union requested to negotiate about the "wages, hours, and working conditions of all employees . . .

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* * *

30. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667, n.15 (1981) (an employer has a duty to bargain about the effects of a managerial decision that impacts on wages, hours or working conditions of employees).

31. It does not appear that the Union is alleging a refusal to bargain about the relocation and consolidation decision. We note, however, that the Union never demanded to bargain about the decision and the parties have not done so. We therefore do not decide whether the Employer would have been obligated to bargain about its decision had the Union demanded bargaining.

affected by [the] sale" of Farmer Jack to the Employer. The parties met on January 5, 6 and 13, March 29 and once in June, 1988. The Union presented a contract proposal on January 6,[32] and the Employer presented a "final offer" counterproposal on January 13.[33] Both proposals addressed the effects of the Employer's decision to relocate and consolidate. Thus, the Union proposed, inter alia, transfer rights with seniority and extension of the Meadow Gold contract with a wage freeze for transferred Meadow Gold employees, while the Employer proposed transferring Meadow Gold employees on a staggered basis, but applying its predecessor's contract. The Union obviously knew during negotiations that the Employer had decided to relocate and consolidate, and thus was negotiating about the effects of that decision in its proposal. Thus, the Union's March 28 request to bargain about the "effects" of the Employer's decision does not negate the fact that the parties were already engaged in "effects" bargaining, and continued to do so on March 29 and at a meeting in June. In short, although no agreement has been reached, the Employer has bargained in good faith about the "effects" of its decision to relocate and consolidate.

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All other allegations should be dismissed, absent withdrawal.

s/ illegible
H.J.D.

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32. See pp. 3-4 supra.

33. See p.4 supra.

APPENDIX G — LETTER FROM NATIONAL LABOR RELATIONS BOARD OFFICE OF THE GENERAL COUNSEL TO TEAMSTERS' COUNSEL, INTRODUCED AS JOINT EXHIBIT 44 DURING THE HEARING BEFORE THE ADMINISTRATIVE JUDGE

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

May 12, 1989

Re: Borden, Inc.
Case No. 27-CA-10412, -2, -3

Stephen W. Cook, Esq.
Cook & Wilde, P.C.
6925 Union Park Center, Suite 490
Midvale, Utah 84047

Dear Mr. Cook:

Your appeal of the Regional Director's refusal to issue a complaint in the above-captioned case has been carefully considered.

The appeal is sustained. It was concluded that the Employer's unilateral implementation of the Farmer Jack contract, as a successor Employer, at the Farmer Jack facility; the Employer's threat and ultimately implemented refusal to transfer Meadow Gold employees to the Farmer Jack facility (as other than newly-hired employees) unless these employees accepted the Farmer Jack contract; and the Employer's unilateral implementation of the Farmer Jack contract as to former Meadow Gold employees raised issues warranting Board determination based on record testimony developed at a hearing before an Administrative Law Judge.

Accordingly, the case is remanded to the Regional Director with instructions to issue an appropriate Section 8(a)(1), (3), and (5) complaint, absent settlement. All further inquiries should be addressed to the Regional Director.

Very truly yours,

Joseph E. DeSio
Acting General Counsel
By s/ Mary M. Shanklin
Mark M. Shanklin, Director
Office of Appeals

cc: Director, Region 27
William F. Schoeberlein, Esq., Sherman and Howard, 3000 First Interstate Tower North, 633 Seventeenth St., Denver, Colorado 80202
Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 222, P.O. Box 30749, 2641 South 3270 West, Salt Lake City, Utah 84130
Keith King, Corporate Labor Counsel, Borden, Inc., 180 East Broad St., Columbus, Ohio 43215

APPENDIX H — STATUTES INVOLVED IN THE PRESENT CASE

28 U.S.C. § 1254 (1993):

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

National Labor Relations Act § 8(a)(1), (3), (5), 29 U.S.C § 158(a)(1), (3), (5) (1993):

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have

certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1973):

§ 159. Representatives and elections

Appendix H

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1973):

§ 160. Prevention of unfair labor practices

* * *

(f) Review of final order of Board on petition to court

Appendix H

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States District Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

No. 94-102

In the Supreme Court of the United States

OCTOBER TERM, 1994

BORDEN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
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National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

QUESTION PRESENTED

Petitioner consolidated the operations of two of its dairy plants, each of which was covered by a separate union contract. The question presented is whether the National Labor Relations Board reasonably concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), when it unilaterally terminated the contract covering one of the plants and applied to the employees transferred from that plant the contract covering the other plant, while it was engaged in negotiations with the union for a new contract to cover the consolidated operation.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-102

BORDEN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 19 F.3d 502. The decision and order of the National Labor Relations Board (Pet. App. 28a-44a), including the decision of the administrative law judge (Pet. App. 45a-99a), is reported at 308 N.L.R.B. 113.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1994. A petition for rehearing was denied on April 18, 1994. Pet. App. 100a-101a. The petition for a writ of certiorari was filed on July 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in the production and sale of milk products. Pet. App. 47a. On or about October 9, 1986, petitioner purchased a dairy facility in Salt Lake City, Utah, known as the "Meadow Gold" plant, from an investment firm that had acquired the assets of Beatrice Foods, Inc. (Beatrice). *Id.* at 4a, 49a. At the time of the purchase, Beatrice was in the process of negotiating a labor contract with Local 222 of the International Brotherhood of Teamsters (Union), which represented the Meadow Gold employees. Petitioner replaced Beatrice in those negotiations and entered into a collective bargaining agreement with the Union covering the Meadow Gold plant, effective May 1, 1987 through November 1, 1990. *Id.* at 4a, 49a-50a.

On November 6, 1987, petitioner purchased a second dairy facility in Salt Lake City, known as the "Farmer Jack" plant, from Borman Acquisition Corporation (BAC). Pet. App. 52a. Prior to petitioner's purchase, the Union, which also represented the Farmer Jack employees, had entered into a labor contract with BAC covering the Farmer Jack plant, effective April 10, 1987 through April 30, 1992; the contract contained substantial monetary concessions by the Union. *Id.* at 4a, 50a-51a. On November 7, 1987, the day following the purchase, petitioner began operating the Farmer Jack plant, retaining all of BAC's employees. *Id.* at 52a. On November 10, petitioner met with the Union to confirm that it had purchased and was operating the Farmer Jack plant, and that it recognized the Union as the collective representative of the employees working at the Farmer Jack plant. Petitioner also advised the Union that it planned to close the Meadow Gold plant, to consolidate the Meadow Gold and Farmer Jack operations at the Farmer Jack plant, and to

assume and apply the Farmer Jack contract at the Farmer Jack plant. *Id.* at 5a, 53a.

On November 12, 1987, the Union requested negotiations with petitioner respecting "the wages, hours, and working conditions of all employees (all Farmer Jack and Meadow Gold) affected by this sale." Pet. App. 53a. The Union also requested petitioner not to alter the Farmer Jack contract unilaterally pending completion of negotiations. *Ibid.* On January 5 and 6, 1988, petitioner and the Union opened negotiations for a new labor contract to cover the Farmer Jack plant, including an agreement respecting the transfer of Meadow Gold employees to the Farmer Jack facility. No agreement was reached during these negotiating sessions, or at further sessions conducted in March, May, and October 1988. *Id.* at 5a, 53a-55a.

In October 1988, petitioner ceased production at the Meadow Gold plant. Meadow Gold employees either took early retirement or were laid off. Pet. App. 5a, 60a-62a. Petitioner, however, selectively transferred some Meadow Gold employees to the Farmer Jack plant by rehiring them as "new" employees performing the same or similar jobs, without seniority rights accrued under the Meadow Gold contract. *Id.* at 5a, 61a. As of October 7, 1988, the bargaining unit at the Farmer Jack plant consisted of 35 former Meadow Gold employees, 31 original Farmer Jack employees, and 13 employees hired "off the street" since petitioner's purchase of the plant from BAC. *Id.* at 61a. Petitioner applied the terms of the concessionary Farmer Jack contract to all of the employees in the bargaining unit, including the 35 former Meadow Gold employees. *Id.* at 5a-6a, 32a.

2. a. On June 15, 1989, the General Counsel of the National Labor Relations Board (Board) issued a consolidated complaint alleging, among other things, that petitioner violated Section 8(a)(5) and (1) of the National

Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1), by unilaterally implementing the Farmer Jack contract as to the Meadow Gold employees that petitioner had transferred to the Farmer Jack plant after the closure of the Meadow Gold plant. Pet. App. 6a-7a & n.3. After a hearing, an administrative law judge (ALJ) dismissed that portion of the complaint. *Id.* at 77a. The ALJ found, first, that the Farmer Jack unit was not an accretion to the Meadow Gold unit, thus rejecting the Union's contention that petitioner was required to apply the Meadow Gold contract to all the Farmer Jack employees. *Id.* at 65a. The ALJ observed that "[w]hile new to [petitioner], the Farmer Jack facility was * * * an existing operation which had been owned by two previous entities and was taken over by [petitioner] as an independent operating facility with all its equipment, supervisory staff, markets and procedures in place and operating." *Ibid.*

The ALJ found merit in the General Counsel's contention that petitioner's obligation to maintain the status quo, pending negotiations for a new contract covering the Farmer Jack plant, required it to continue to apply the Meadow Gold contract to the transferred Meadow Gold employees until the parties reached a new contract or impasse. Pet. App. 75a. Moreover, the ALJ found that no such impasse had occurred, as "[petitioner's] implementation of the [Farmer Jack] contract was a course of conduct undertaken from the time of its acquisition of the [Farmer Jack] facility and was not initiated after some later argued impasse in bargaining." *Id.* at 69a. Nevertheless, the ALJ declined to hold that petitioner's application of the Farmer Jack contract to the transferred Meadow Gold employees violated Section 8(a)(5) and (1) because, in his view, to require petitioner to maintain a "bifurcated" status quo, pending negotiation of a new agreement for the Farmer

Jack plant, would "expand[ ] [the] reach" of the Act. Pet. App. 76a.

b. The Board affirmed the ALJ's factual findings, but reversed the dismissal of the complaint, concluding instead that petitioner had violated Section 8(a)(5) and (1) by unilaterally applying the Farmer Jack contract to the transferred Meadow Gold employees. Pet. App. 30a n.4, 36a. The Board held that "where two separate units of the same employer represented by the same union contribute substantial proportions of employees to a new unit, an employer is obligated to preserve the status quo with respect to each of the two groups until it reaches either a new agreement or a bargaining impasse." *Id.* at 35a. Drawing on an analogy to its decision in *Federal-Mogul Corp.*, 209 N.L.R.B. 343 (1974), the Board explained that its holding was "substantially consistent with the manner in which the Board has treated the obligation of an employer respecting the terms and conditions of previously unrepresented employees who are added to a bargaining unit as a result of an *Armour-Globe* election during the term of a collective-bargaining contract covering the larger unit." Pet. App. 34a (footnote omitted).[1] The Board observed that, in such a situation, "[t]he newly added, or 'fringe group,' employees are not automatically swept under the terms of the agreement covering the existing unit * * *. Rather, the union and the employer bargain over

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[1] In an "*Armour-Globe*" election, unrepresented employees decide whether to include themselves in a bargaining unit that has already selected union representation and is covered by a labor agreement. See *Armour & Co.*, 40 N.L.R.B. 1333, 1334-1337 (1942); *Globe Machine & Stamping Co.*, 3 N.L.R.B. 294, 299-300 (1937). In *Federal-Mogul*, the Board held that the employer violated Section 8(a)(5) of the Act by unilaterally imposing a labor contract covering an existing unit on previously unrepresented employees who voted for inclusion in that unit. 209 N.L.R.B. at 343.

the terms and conditions under which the fringe group will work until the contract in the larger unit expires, and the status quo from which they bargain is the current working conditions of those employees." *Ibid.*

The Board rejected petitioner's contention that to require it to maintain a bifurcated status quo while bargaining to agreement or impasse would create industrial unrest. The Board explained that "our experience and judgment leads us to conclude that [a bifurcated status quo rule] is more likely to prompt both parties to negotiate an agreement expeditiously" because "each will be motivated to reach agreement to forestall the continued application of the contract that each party views as the less desirable one." Pet. App. 36a.[2] While the Board acknowledged that, in some circumstances, there may be a practical justification for not requiring the employer to maintain a bifurcated status quo while negotiating a single contract for the unit, *ibid.*, the Board concluded, "here * * * we see no 'legal or practical justification for permitting either party to escape its normal bargaining obligation,' which is to bargain with the employees' previous conditions of employment as the starting point." *Id.* at 35a (quoting *Federal-Mogul Corp.*, 209 N.L.R.B. at 344). The Board explained:

> Maintaining the status quo by requiring the terms of both contracts to remain in effect after a consolida-

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[2] The Board also rejected petitioner's contention that to maintain a bifurcated status quo, even for a limited period of bargaining, would present the union with a conflict of interest because different segments of the bargaining unit would enjoy different wages and benefits. Pet. App. 36a. The Board noted that "this situation [is] at least comparable to the dual-tier bargaining structures which have been routinely advanced as employer proposals in numerous industries and have frequently thereafter been agreed to and administered by unions without disqualifying conflicts of interest." *Ibid.*

> tion, such as the one that occurred here, promotes the statutory interest of stability in collective bargaining. Maintaining the status quo ensures that both portions of the merged unit begin from the same relative point. Like any employees in a pre-bargaining posture, they both enter negotiations with their respective preexisting terms and conditions of employment intact.

Pet. App. 35a.

To remedy petitioner's violation of Section 8(a)(5) and (1), the Board ordered petitioner to rescind any departures from the terms and conditions of employment that had been applicable to the transferred Meadow Gold employees prior to their transfer, to make them whole for any loss of earnings or other benefits suffered as a result of those departures, and to bargain with the Union. Pet. App. 40a.[3]

3. The court of appeals enforced the Board's order. Pet. App. 27a. The court concluded that "the Board's solution—to maintain the status quo and hold [petitioner] to the terms of the [collective bargaining agreements] to which it had voluntarily agreed," pending negotiation of a new contract to cover all the employees at the Farmer Jack

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[3] The Board, in agreement with the ALJ, also found that petitioner violated Section 8(a)(5) and (1) of the Act by promising certain Meadow Gold employees increased benefits if they abandoned the Union, and by threatening to lay off or to refuse to transfer Meadow Gold employees to the Farmer Jack plant unless the Union accepted petitioner's last bargaining offer. Pet. App. 30a n.4, 79a, 89a. Petitioner did not challenge these findings in the court of appeals. The Board further found that the Meadow Gold employees who took early retirement, rather than accept employment under the terms and conditions of the Farmer Jack contract, were constructively discharged in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). Pet. App. 36a-37a. The court of appeals upheld that finding, *id.* at 27a, and petitioner does not challenge it here. Pet. 8-9 n.7.

plant, "neatly balances the interests of the employer, the employees, and the National Labor Relations Act." *Id.* at 18a. Further, the court affirmed the ALJ's findings that the Farmer Jack unit was not an accretion to the Meadow Gold unit, and that negotiations for a new agreement to cover the Farmer Jack plant never reached impasse. *Id.* at 13a, 27a. Finally, the court rejected petitioner's contention that the Board's decision created a "new" rule that should not be applied "retroactively" to its conduct. The court concluded that "the question of retroactivity does not arise in the present case," for the Board did not overrule a controlling precedent upon which petitioner had relied to its detriment, "[t]here was never any legal justification for [petitioner's] application of the [Farmer Jack] contract to the Meadow Gold employees," and "[t]he Board's order merely recognizes this fact." *Id.* at 19a.

ARGUMENT

1. It is well settled that the National Labor Relations Act (Act) requires an employer to maintain the status quo during negotiations for a new contract with the union representing its employees. See *NLRB* v. *Katz,* 369 U.S. 736, 743 (1962); *May Dep't Stores* v. *NLRB,* 326 U.S. 376, 385 (1945). This case involves merely the application of that principle to a new set of circumstances. The National Labor Relations Board (Board) was required to decide *what is* the status quo that must be maintained "where two separate units of the same employer represented by the same union contribute substantial proportions of employees to a new unit." Pet. App. 35a. The Board reasonably determined that, in such a case, the employer must continue to apply to the transferred employees the terms and conditions of the contract that had governed those employees until it concludes a new contract with the union or

reaches a bargaining impasse. That determination is entirely consistent with the Act.

Before the Board, petitioner attempted to justify its unilateral application of the Farmer Jack contract to the Meadow Gold transferees on the ground that "the former [Farmer Jack] contract in effect at Farmer Jack constitute[d] the status quo for the combined unit of employees." Pet. App. 33a. The Union, taking a diametrically opposed view of petitioner's obligations under the Act, contended that petitioner was required to apply the Meadow Gold contract to all of the employees, including the Meadow Gold transferees, because the Farmer Jack unit was an accretion to the Meadow Gold unit. *Id.* at 62a. The Board rejected both of the extremes urged by petitioner and the Union, and adopted instead a middle position, under which petitioner is required to apply the Meadow Gold contract to the transferred Meadow Gold employees, and the Farmer Jack contract to the original Farmer Jack employees, pending the negotiation of a new agreement covering the new consolidated operation at the Farmer Jack plant, or until the parties reach a bargaining impasse. *Id.* at 35a. As the Board explained (*ibid.*), maintaining the status quo "promotes the statutory interest of stability in collective bargaining" by ensuring that "both portions of the merged unit * * * enter negotiations with their respective preexisting terms and conditions of employment intact."

The court of appeals, recognizing that the Board's rule is entitled to deference if it constitutes a reasonable and defensible interpretation of the Act (Pet. App. 12a), concluded that "the Board's solution—to maintain the status quo and hold Borden to the terms of the [collective bargaining agreements] to which it had voluntarily agreed—neatly balances the interests of the employer, the employees, and the National Labor Relations Act." *Id.* at 18a.

2. Petitioner asserts (Pet. 10) that the Board's bifurcated status quo requirement is inconsistent with the principle of majority rule, which is the cornerstone of national labor policy, for a corollary of that principle is that "where two or more separate units of employees are merged due to a corporate change, *e.g.*, merger, the new, single contingent of employees is governed by one set of terms and conditions of employment, as determined by the majority." Since the transferred Meadow Gold employees constituted less than a numerical majority at the Farmer Jack plant after the consolidation (35 of 79 employees), petitioner argues that it was entitled to apply the existing Farmer Jack contract to all the employees at that plant, including the Meadow Gold transferees. There is no merit to that contention.

a. As the Board recognized (Pet. App. 34a-35a), this case is analogous to the situation in which unrepresented employees choose to become part of a bargaining unit that is already represented by a union and covered by a collective bargaining agreement. In such a case, the newly added employees are not automatically swept under the terms of the agreement covering the existing unit; rather, the union and the employer bargain over the terms and conditions of the new employees while maintaining the status quo of the current conditions of those employees. See *ibid.*; *Federal-Mogul Corp.*, 209 N.L.R.B. 343 (1974). In both cases, "when it comes time to negotiate a new contract, the Union and the Employer must bargain for a single contract to cover the entire unit" (*Federal-Mogul Corp.*, 209 N.L.R.B. at 344), but in the interim, the employer "must deal with the problems of each * * * group" (*id.* at 345), and this approach "is to be preferred, both legally and practically, over automatically lifting the new group, sans bargaining, into a fixed mold no matter how badly

that mold may fit either the employees' or the employer's circumstances" (*ibid.*).

Contrary to petitioner's contention (Pet. 10-11), *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), does not suggest a different result. In *Burns*, the Court held that, while Burns was a successor to Wackenhut (a majority of Burns's workforce consisting of former Wackenhut employees) and was thus obligated to recognize and bargain with the union representing Wackenhut's employees, Burns was not bound by the substantive provisions of Wackenhut's labor contract to which Burns did not consent. Petitioner argues (Pet. 11) that, since Burns was not obligated to maintain separate terms and conditions of employment for the Wackenhut group and the Burns group of employees, "[t]he upshot of *Burns* is that one set of terms and conditions of employment, as determined by the majority through collective bargaining, would apply to all of Burns' employees."

Petitioner's reading of *Burns* is incorrect. *Burns* held only that the successor corporation was free to negotiate a new contract for the employees obtained from Wackenhut, and the Court did not address the point raised by petitioner here. In *Burns*, the Court stated that, where it was "perfectly clear" that a successor intended to take over the predecessor's work force, the successor was not free to change the existing terms and conditions without bargaining with the union (406 U.S. at 294-295), but the Court did not address the question of what would constitute those existing terms and conditions in a particular case. As the court of appeals pointed out here (Pet. App. 16a), "[petitioner], in fact, had an opportunity to renounce the [contract] negotiated by its predecessor[ ]" under *Burns* when it acquired the Meadow Gold plant. Petitioner nevertheless chose to negotiate a new contract with the Meadow Gold

employees, and nothing in *Burns* authorized it to dishonor a contract that it negotiated.

Nor is petitioner aided by *Central Soya Co.* v. *NLRB,* 867 F.2d 1245 (10th Cir. 1988) (Pet. 11). There the employer, which operated a unionized feed mill, acquired a nonunion feed mill, transferred the unionized employees to the nonunionized plant, and announced that the consolidated facility would be run as a nonunion operation, refusing to recognize the union or honor the union contract following the consolidation. 867 F.2d at 1246. The court, in agreement with the Board, held that the nonunion employees were an accretion to the unit of unionized employees because the nonunion employees "did not perform different operations, use different types of specialized equipment, function in different work areas, or fall under different supervision" (*id.* at 1248), and their addition did not "numerically overshadow the existing bargaining unit" since the unionized employees comprised a majority of the employees in the consolidated unit (*id.* at 1248-1249).

Petitioner asserts (Pet. 11) that *Central Soya* demonstrates that "one set of terms and conditions of employment, as determined by the majority, apply to all employees in the same unit." Petitioner overlooks the fact that, unlike *Central Soya,* this case does not involve the accretion of one group of employees, without a history of bargaining on its own, into another unit of employees. Here, the ALJ, affirmed by both the Board and the court of appeals (Pet. App. 13a, 30a n.4), found that the Farmer Jack unit was not an accretion to the Meadow Gold unit, for "the Farmer Jack unit was not simply a new unit of employees without a history of collective bargaining or a separate identity of its own," but rather was "an existing operation which had been owned by two previous entities

and was taken over by [petitioner] as an independent operating facility with all its equipment, supervisory staff, markets and procedures in place and operating." *Id.* at 65a.

Petitioner's reliance (Pet. 12) on *Harte & Co.*, 278 N.L.R.B. 947 (1986), is similarly misplaced. In that case, the employer relocated its operation to a new facility, and it transferred a sufficient number of its employees, who were covered by a union contract, to the new facility such that they comprised 40 percent of the workforce there; the remainder of the employees at the new facility were not represented by a union. *Id.* at 947-948. The Board held that the employer lawfully applied the union contract to its entire work force, explaining: "[A]n existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement." *Id.* at 948. Even if the principle enunciated in *Harte* were applicable to plant consolidations (but see *Central Soya Co.*, 281 N.L.R.B. 1308, 1309 n.6 (1986), aff'd, 867 F.2d 1245 (10th Cir. 1988)), that principle requires substantial similarity between the operations involved; here, as the ALJ found, the consolidated operation at the Farmer Jack plant was different from, not substantially similar to, either preconsolidation operation. Pet. App. 66a-67a.

Finally, there is no support for petitioner's contention (Pet. 12-13) that, where the employer's organizational change "does not fit neatly" into the category of "an accretion or relocation," the "implication is that the employer can choose which one set of terms and conditions of employment should apply to all employees subject, of course, to the bargaining process[.]" In particular, the excerpt from the Board's Division of Advice memorandum, cited

by petitioner (Pet. 12 n.9),[4] concluded only that, because the original Farmer Jack unit was not an accretion to the Meadow Gold unit, petitioner did not violate the Act by declining to apply the Meadow Gold contract to the Farmer Jack employees. But, since the memorandum did not address the different question considered by the Board—namely, whether the Farmer Jack contract could lawfully be applied to the Meadow Gold transferees, pending negotiation of a new contract for the consolidated operation—there is no warrant for petitioner's inference that it believed it would be free to apply the Farmer Jack contract to everyone.

b. Even if there were merit to petitioner's contention that, as a general proposition, an employer that consolidates two units may unilaterally disregard the contract covering the transferees if they constitute a minority of the newly consolidated operation, that principle would not govern this case. It was only by virtue of petitioner's unlawful conduct that the Meadow Gold employees were in the minority. The Board found (Pet. App. 36a-37a), and petitioner concedes (Pet. 8 n.7), that those Meadow Gold employees who elected to take early retirement, rather than accept a transfer to the Farmer Jack plant and subject themselves to the reduced wages and benefits mandated by the Farmer Jack contract, were constructively discharged in violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). But for the unlawful discharges, petitioner would not have hired 13 employees "off the street" to work at the Farmer Jack plant, and, absent those hires, original Farmer Jack employees would have constituted only a minority of the employees (31 of 79) at the Farmer Jack plant. Under these circumstances, petitioner was not free, even under its hypothesis, uni-

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[4] The memorandum is discussed further, pp. 16-17, *infra*.

laterally to apply the Farmer Jack contract to all of the employees. Cf. *Westwood Import Co.*, 251 N.L.R.B. 1213, 1215-1216 (1980), enforced, 681 F.2d 644 (9th Cir. 1982).

3. There is no merit to petitioner's contention (Pet. 13) that the Board's bifurcated status quo rule is inconsistent with this Court's admonition in *Burns* (406 U.S. at 288) that "[t]he congressional policy manifest in the Act is * * * to allow the balance of bargaining advantage to be set by economic power realities." Far from "skew[ing] the starting point for negotiations" (Pet. 14), the Board's rule furthers that very policy. Petitioner's predecessor possessed sufficient economic power to exact concessionary terms from the Union at the Farmer Jack plant, but the Union possessed sufficient economic power to demand relatively more generous terms from petitioner at the Meadow Gold plant. Petitioner would require the Union to surrender the gains achieved at the Meadow Gold plant even before the start of negotiations for a new agreement. Such a result would be contrary to the policies of the Act, for, as the Court observed in *Burns*, "[s]trife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties." 406 U.S. at 288.

Equally wide of the mark is petitioner's contention (Pet. 17-18) that, contrary to the teaching of *Burns*, the Board's rule "saddles [petitioner] with a collective bargaining agreement negotiated under circumstances which it determined were no longer financially feasible." Petitioner itself negotiated the Meadow Gold contract in May 1987 and agreed to an expiration date of November 1, 1990. Pet. App. 50a. Petitioner subsequently concluded, when it acquired the Farmer Jack plant, that the terms it assented to in the Meadow Gold contract were not, in hindsight, so

advantageous as it might have wished; that, however, is not a lawful basis for it to dishonor the Meadow Gold contract in mid-term. Moreover, the Board's status quo rule does not require petitioner to honor the Meadow Gold agreement until its expiration date, but only for a limited period of bargaining or until the parties reach impasse in negotiations for a new contract. *Id.* at 35a.

4. There is no substance to petitioner's contention (Pet. 25-29) that the Board improperly applied a "new" rule to it retroactively in this case. The court of appeals correctly concluded that "the question of retroactivity does not arise in the present case." Pet. App. 19a. As the court pointed out, *Central Soya,* the decision which petitioner invoked to justify its unilateral rejection of the Meadow Gold contract, "simply is inapposite"; "[t]he Board has not overruled any controlling precedent upon which [petitioner] relied to its detriment," and petitioner never had any legal justification for applying the Farmer Jack contract to the Meadow Gold employees. *Ibid.* In short, the court properly characterized the Board's decision as "clearly * * * an attempt to fill a void created by the unprecedented factual situation * * * not an abrupt departure from well-established practice." *Id.* at 21a.[5]

There is also no merit to petitioner's suggestion (Pet. 27) that the Board's bifurcated status quo rule should not be applied to it in this case because it relied, during the latter half of the consolidation process, on a July 1988 memo-

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[5] Petitioner's reliance (Pet. 29) on this Court's decision in *Landgraf* v. *USI Film Products,* 114 S. Ct. 1483, 1497 (1994), in support of a "presumption against retroactivity," is misplaced. *Landgraf* addressed the retroactive application of a new statute, not a judicial or administrative determination of federal law existing at the time of the conduct at issue. Cf. *James B. Beam Distilling Co.* v. *Georgia,* 501 U.S. 529, 535 (1991) (opinion of Souter, J.) (retroactive application of judicial decisions is "overwhelmingly the norm").

randum prepared by the Board's Division of Advice, which recommended that the Regional Director decline to issue a complaint respecting petitioner's rejection of the Meadow Gold contract. Pet. App. 114a-115a. Any such reliance on that memorandum by petitioner was legally unjustified. The Board's procedural rules provide that "[i]f, after a charge has been filed, the regional director declines to issue a complaint * * * [t]he person making the charge may obtain a review of such action by filing an appeal with the general counsel." 29 C.F.R. 102.19(a). After the Regional Director dismissed the Union's charge, the Union filed an appeal, and the General Counsel remanded the charge to the regional office for additional investigation in October 1988, thus making it clear to petitioner that the issue had not been definitively resolved. See Gov't C.A. Br. 25. No reasonable employer was entitled to conclude, in those circumstances, that its course of conduct had been determined to be proper under the Act.[6]

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[6] Petitioner raises a number of other meritless contentions. First, petitioner states (Pet. 21) that, "[t]o the extent that the Tenth Circuit holds that an employer must implement every term of its last offer for its unilateral action to be lawful, its decision is plainly contrary to existing federal law." That issue is not presented here. First, the court evaluated petitioner's conduct under the standard that "an employer has the right to implement all or *part* of its final offer with respect to a mandatory subject of bargaining upon an impasse in negotiations." Pet. App. 24a (emphasis added). Second, the court also found that the parties never reached impasse. *Id.* at 27a. Petitioner's further contention (Pet. 23) that substantial evidence does not support the court's finding raises a fact-bound issue that does not merit review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Lastly, petitioner incorrectly asserts (Pet. 23) that the court of appeals misconstrued the ALJ's finding respecting the effect of the Union's November 12, 1987 letter requesting petitioner not to alter the Farmer Jack contract unilaterally pending negotiations for a new agreement. The ALJ did not, as petitioner contends, find that the letter amounted

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994

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to a waiver of the Union's right to object to petitioner's rejection of the Meadow Gold contract. Had the ALJ so construed the letter, there would have been no occasion for him to reach the General Counsel's contention that petitioner was required to maintain a bifurcated status quo in the circumstances of this case. Pet. App. 72a-77a.

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